CHAPTER 4

LEGISLATIVE MEASURES

The Constitution of India ensures equality, freedom, justice and dignity to all individuals and implicitly mandates an inclusive society for all including persons with disabilities. In the recent years, there has been a broadly positive change in the perception of society towards the persons with disabilities. As discussed in the preceding chapters, according to the Census of 2001, there are 2.19 crore persons with disabilities in India which constitute 2.13 per cent of the total population. This includes persons with visual, hearing, speech, locomotor and mental disabilities and the addition of three more categories as per the 2011 Census. Seventy-five per cent of persons with disabilities live in far-flung rural areas and 49 per cent of the disabled population are literate and only 34 per cent are employed (Annual Report 2009-10: 101). It has been realised that a majority of persons with disabilities can lead a better quality of life, if they are given equal opportunities and effective access to rehabilitation measures. All these are achieved considerably through the legislative measures enacted for realisation of their rights. Legislation is one of the effective measures to ensure that persons with disabilities enjoy the same rights and freedom as other members of the community so that they can develop their potential and integrate into the community to the fullest extent possible. Hence, this chapter is focused on the role of legislative measures taken by the Government of India concerning empowerment of the persons with disabilities.

1 Disability related legislation and legislative provisions.

4.1 Disability legislation in India

- Mental Health Act, 1987
- Rehabilitation Council of India Act, 1992
- Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act, 1995)
- National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999

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In addition to the above mentioned legislations, government has come out with a National Policy for Persons with Disabilities. A detailed discussion of each act is made in this section.

4.1.1 Mental Health Act, 1987

- Salient features

The law relating to the treatment and care of mentally ill persons were earlier regulated by the Lunacy Act, 1912. With the change in attitude of the society towards persons afflicted with mental illness, it is now realised that no stigma should be attached to such illness as it is curable particularly when diagnosed at an earlier stage. They are to be treated like any other sick person and the environment around them should be made as normal as possible. With this objective the Lunacy Act was replaced by the Mental Health Act of 1987.\(^1\)

The purpose of the Act is to regulate admission to psychiatric hospital or nursing homes of mentally ill persons\(^2\) who do not have sufficient understanding to seek treatment on a voluntary basis and to protect the rights of such persons while being detained. The Act also seeks to protect society from the presence of mentally ill persons who have become or might become a danger or nuisance to others, to regulate responsibility for maintenance of such mentally ill persons while they are detained in psychiatric hospitals and nursing homes. It also provides facility for establishing guardianship or custody of mentally ill persons who are incapable of managing their own affairs. Under this Act, the government has power to regulate establishment, licensing, and control of psychiatric hospitals and nursing homes.

- Objectives of the Act

(i) To establish Central and State authorities for licensing and supervising the psychiatric hospitals

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1 The Act came into force in all States and union territories on 1\(^{st}\) April 1993. It was enacted in pursuance of Entry 16 of the Concurrent List of the Constitution, that is, Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

2 A mentally ill person is one who is in need of treatment by reason of any mental disorder other than mental retardation.
(ii) To establish such psychiatric hospitals and nursing homes and to provide a check on working of these hospitals

(iii) To provide for the custody of mentally ill persons who are unable to look after themselves and are dangerous for themselves and or others

(iv) To protect the society from dangerous manifestations of mentally ill

(v) To regulate procedure of admission and discharge of mentally ill persons to the psychiatric hospitals or nursing homes either on voluntary basis or on request

(vi) To safeguard the rights of these detained individuals

(vii) To protect citizens from being detained unnecessarily

(viii) To provide for the maintenance charges of mentally ill persons undergoing treatment in such hospitals

(ix) To provide legal aid to poor mentally ill criminals at State expenses

(x) To change offensive terminologies of Indian Lunacy act to new ones

- Central Authority for Mental Health Services

This authority established by the Central Government is responsible for regulation, development, direction and co-ordination with respect to mental health services under the Central Government. It supervises the psychiatric hospitals, nursing homes and other mental health agencies under the control of the central government and also advises the latter on all matters to mental health.

State authority for mental health services are established by the State Governments to carry on the same functions as the Central authority but within the State for which it has been set up.

- Procedure for admission and discharge of mentally ill

A mentally ill person (not a minor) may make a request for admission as a voluntary patient; in case of minor his guardian may make such request. On such request medical officer in-charge after enquiry within 24 hours if he thinks necessary may admit such person. The medical officer\(^3\) shall discharge such patients on request

\(^{3}\) Medical officer is a registered medical practitioner and Medical officer in-charge is a medical officer who is in charge of a psychiatric hospital or nursing home.
by him or guardian as the case may be, unless he finds such discharge against patient's interests. Such cases will be referred to a medical board, which if decides the same, then the patient will be further admitted for a period not exceeding 90 days for treatment.

A mentally ill person may be admitted as in-patient on a request by friends or relatives. Such request should be supported by medical certificates to the effect. In such cases medical officer in-charge may admit the patient if he thinks necessary. Request for admission may also be made by a police officer if such mentally ill person is dangerous to himself or others. Such persons will be discharged by magistrate on request by friends/relatives or after they are certified to be sane by the board of experts.4

- Rights of the disabled who are mentally ill

(i) A right to be admitted, treated and taken care of in psychiatric hospital or psychiatric nursing home or convalescent home established or maintained by the Government or any other person for the treatment and care of mentally ill persons.

(ii) Minors who are under the age of 16 years, those persons who are addicted to alcohol or other drugs which lead to behavioural changes and those convicted of any offence are entitled to admission, treatment and care in separate psychiatric hospitals or nursing homes established or maintained by the Government.

(iii) Mentally ill persons have the right to have regulated, directed and co-ordinated mental health services from the Government which through the Central Authority and the State Authorities set up under the Act have the responsibility of such regulation and issue of licenses for establishing and maintaining Psychiatric hospitals and nursing homes.

(iv) Mentally ill persons can seek voluntary admission in such hospitals or nursing homes and minors can seek admission through their guardians. Admissions can be sought for by relatives of mentally ill persons on

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4 Most of the sections of the Act are in accordance with Mental Health Act 1959 and the Mental Health (Amendment) Act 1982 of England and Mental Health Act 1960 of Scotland with minor differences.
behalf of the latter. Applications can also be made to the local magistrate for grant of reception orders.

(v) The police has an obligation to take into protective custody a wandering or neglected mentally ill person and inform his relatives and to produce such person before the local magistrate for issue of reception orders.

(vi) Mentally ill persons have the right to be discharged when cured and entitled to 'leave' in accordance with the provisions of the Act.

(vii) Where mentally ill persons own properties including land which they cannot themselves manage, the District court upon application has to protect and secure the management of such properties by entrusting the same to a Court of Wards, by appointing guardians of such mentally ill persons or appointment of managers of such property.

(viii) The cost of maintenance of mentally ill persons detained as in-patient in any Government psychiatric hospital or nursing home shall be borne by the State Government concerned unless such costs have been agreed to be born by the relative or other person on behalf of the mentally ill person and no provision for such maintenance has been made by order of the District Court. Such costs can also be borne out of the estate of the mentally ill person.

(ix) Mentally ill persons undergoing treatment shall not be subjected to any indignity (whether physical or mental) or cruelty. Nor can such mentally ill person be used for purposes of research except for his diagnosis or treatment or with his consent.

(x) Mentally ill persons who are entitled to any pay, pension, gratuity or any allowance from the Government such as Government servants who become mentally ill during their tenure are not to be denied such payments. The person who is in-charge of such mentally ill person or his dependents will receive such payments after the Magistrate has certified the same.

(xi) A mentally ill person shall be entitled to the services of a legal practitioner by order of the Magistrate or District Court if he has no means to engage a legal practitioner or his circumstances so warrant in respect of proceedings under the Act.
• Criticism of the Act and suggestions for improvement

(i) Change of older terminologies to newer ones might be good from theoretical aspects. But practically the question is “will that be helpful in removing the social stigma attached to the illness?” (Rastogi 2005:178)

(ii) Licensing authorities do not have a doctor who may be in a position to assess the facilities and services of these centers.

(iii) Concept of establishing new hospitals might appear good but in a developing country like ours this might be a costly affair. It will put extra burden on health budget.

(iv) No mention is made of incorporating general hospitals and centers in this act rather they are prohibited. Such hospitals if taken along may provide a better health care.

(v) Although the Act provides for a simpler discharge procedure but no provisions are made for after discharge care and rehabilitation of patients.

(vi) In case no relative comes forward for discharge of patient, will that person be detained indefinitely in hospital and there is no provision as to who will bear the expenses in such case. If it is Government and then how long, which remains as a big question mark?

(vii) There is no provision for punishing the relatives and officers requesting unnecessary detention of such person to such hospitals.

(viii) The Act adopts different views for government and private hospitals.

In the light of the above mentioned drawbacks some suggestions for improvement are highlighted:

(i) Provisions for educating society about mental illness and treating it at par with physical illness should be incorporated.

(ii) Licensing process should be made simpler and provisions should be there for checking the working of licensing authorities and powers vested in them should be limited.

(iii) Licensing authorities should appoint a doctor preferably a psychiatrist as inspecting officer.
(iv) Private doctors and general nursing homes should be allowed to treat such patients at par with recognised centers. This will help in reducing the workload on the system and will provide such better health care to the patients. This provision can be withdrawn later, once there are adequate recognised hospitals with adequate staff.

(v) Other than children and addicts even separate places are to be provided for elderly, destitute and women.

(vi) Adequate provisions to be provided for long-term treatment and expenses on treatment. If this is not possible, then community mental health centers should be opened to provide such care.

(vii) Provisions for rehabilitation centers are to be incorporated. Efforts should be there for post discharge care and rehabilitation.

(viii) Strict provisions should be there for punishing the individuals requesting unnecessary detention and exploitation of mentally ill.

(ix) Stress should be on treatment of illness rather than the ill and more over the treatment should be based on the concept of socialisation and not on hospitalisation.

A National Consultation on the mental health programme was held under the chairpersonship of Secretary, Health and Family Welfare, Government of India with the objective to review and identify gaps in the mental health programme and actions to fill up these gaps (Pathere and Sagade 2010:2) It was felt that the Mental Health Act 1987 is archaic and needs amendment. All the participants were of the view that the law should move towards supporting, promoting and protecting the rights of persons with mental illness. Participants also felt there should be a departure from the policy of dealing with mental illness just as a law and order problem, the focus should be community care, and a range of support systems should be incorporated into the Mental Health Act. Hence it was suggested that an urgent re look at the issues related to involuntary admission, reception orders, guardianship etc was needed.5

5 The first draft was circulated by 28th February, 2010 among the participants of the meeting and other stakeholders and comments sought by 15th March, 2010. On the basis of comments received the draft was amended by the end of March 2010. In April, regional consultations were held on the proposed amendments to Mental Health Act and were finally crystallized on 23rd May 2010. For more information visit http://www wbhealth gov in/download/amendments.pdf
While revisiting the Mental Health Act, it has to be ensured that the amendments are in harmony with the Convention.\(^6\)

**4.1.2 The Rehabilitation Council of India Act, 1992**

This Act was passed for the purpose of constituting the Rehabilitation Council of India regulating the training of Rehabilitation professionals and for maintenance of a Central Rehabilitation register. It was amended by the Rehabilitation Council of India (Amendment) Act, 2000 which provides for monitoring the training of rehabilitation professionals and personnel, promoting research in rehabilitation and special education as additional objectives of the Act.

- **Objects of the Act**

The purpose of the Act is to transform the erstwhile Rehabilitation Council, a society formed and registered in 1986 under the Societies Registration Act, 1860 into a statutory body. Accordingly, the Rehabilitation Council of India has been set up by the Central Government by notification so that the functions allotted to the Rehabilitation Council of India under the Act may be performed in pursuance to the statute and the powers exercised by the Rehabilitation Council of India may be deemed as statutory powers. This was necessary in view of the fact that the Rehabilitation Council of India was envisaged to be the apex body for recognition of qualifications for Rehabilitation professionals, enroll them and maintain the Central Register of Rehabilitation professionals and for regulating their conduct.

- **Salient features of the Act**

(i) **Composition of Rehabilitation Council of India:**

The Council shall consist of the following members, namely:

(a) a chairperson, from amongst the persons having experience in administration with professional qualification in the field of rehabilitation, disabilities and special education to be appointed by the Central Government;

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\(^6\) Unfortunately, the greatest criticism is that the draft produced by Dr Soumitra Pathare and Professor Jaya Sagade has in no way inducted legal capacity in the Mental Health Act. The draft says at several places that persons living with mental illness possess legal capacity but then goes ahead and provides a procedure by which such capacity can be ousted by the so-called support person (The Times of India: 2010)
(c) not exceeding seven members to be nominated by the Central Government to represent respectively the Ministries of the Central Government dealing with matters relating to persons with disabilities;

(d) one member to be appointed by the Central Government to represent the University Grants Commission;

(e) one member to be appointed by the Central Government to represent the Directorate General of Indian Council of Medical Research;

(f) two members to be appointed by the Central Government to represent the Ministry or department of the States or the Union territories dealing with Social Welfare by rotation in alphabetical order;

(g) such number of members not exceeding six as may be appointed by the Central Government from amongst the rehabilitation professionals working in voluntary organisations;

(h) such number of members not exceeding four as may be appointed by the Central Government from amongst the medical practitioners enrolled under the Indian Medical Council Act, 1956 in the Indian Medical Register and engaged in rehabilitation of the handicapped;

(i) three Members of the Parliament of whom two shall be elected by the House of the People and one by the Council of States;

(j) such number of members not exceeding three as may be nominated by the Central Government from amongst the social workers who are actively engaged in assisting the disabled;

(k) the member-Secretary, ex-officio.

(ii) Executive Committee:

(a) The Council shall constitute from amongst its members an Executive Committee and such other committees for general or special purposes as the Council deems necessary to carry out the purposes of this Act.

(b) The Executive committee shall consist of the Chairperson who shall be member ex officio and not less than seven and not more than ten members who shall be nominated by the council from amongst its members

(c) The Chairperson shall be the Chairperson of the Executive Committee
(d) In addition to the powers and duties conferred and imposed upon it by this Act, the Executive Committee or any other committee shall exercise and discharge such powers and duties as the council may confer or impose upon it by any regulations which may be made in this behalf.

- Functions of the Council

(i) Recognition of qualifications from Indian universities

(1) The qualification granted by any university or other institution in India which are included in the schedule to the Act shall be recognised qualifications for rehabilitation professionals.

(2) Any university or other institution which grants qualification for the rehabilitation professionals not included in the schedule may apply to the Central Government to have any such qualification recognised, and the Central Government, after consulting the Council may by notification, amend the Schedule so as to include such qualification therein and any such notification may also direct that an entry shall be made in the last column of the schedule against such qualification only when granted after a specified date.

(ii) Enrolment of qualified rehabilitation professionals:

(1) Subject to the other provisions contained in this Act, any qualification included in the schedule shall be sufficient qualification for enrolment on the register.

(2) No person, other than the rehabilitation professional who possesses a recognised rehabilitation qualification and is enrolled on the register and any person being a doctor in the field of physical medicine and rehabilitation, orthopaedic, ear, nose, or throat (ENT), ophthalmology or psychiatry employed or working in any Government hospital:

(a) shall hold office as rehabilitation professional or any such office in Government or in any institution maintained by a local or other authority

(b) shall practice as rehabilitation professional anywhere in India

(c) shall be entitled to sign or authenticate any certificate required by any law to be signed or authenticated by a rehabilitation professional
(d) shall be entitled to give any evidence in any court as an expert under section 45 of the Indian Evidence Act, 1872 on any matter relating to the handicapped.

Provided that if a person possesses the recognised rehabilitation professional qualifications on the date of commencement of this Act, he shall be deemed to be an enrolled rehabilitation professional for a period of six months from such commencement, and if he has made an application for enrolment on the Register within said period of six months, till such application is disposed off;

(3) Any person who acts in contravention of any provision of sub section (2) shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

(iii) Withdrawal of recognition

The Council has the power to appoint such number of Inspectors\(^7\) as it may deem requisite to inspect any University or institution where education for practising as rehabilitation professionals is given. Where the inspector or Visitor reports want of prescribed standards by any University or Institution the council will report to the Central Government which may after calling for explanation notify an entry in the Schedule to the Act that the recognized rehabilitation qualification shall be valid only from a specified date.

(iv) Council to prescribe minimum standards of education

The council may prescribe the minimum standards of education required for granting recognised rehabilitation qualification by Universities or institutions in India.

(v) Registration of rehabilitation professionals

The Member-Secretary of the Council may, on receipt of an application made by any person in the prescribed manner enters his name in the register provided that

\(^7\) The council may also appoint such number of visitors as it may deem requisite for the above mentioned purpose.
the Member secretary is satisfied that such person possesses the recognized rehabilitation qualification.

(vi) Privilege of persons registered on the register

Subject to the conditions and restrictions laid down in this Act regarding engagement in the area of rehabilitation of the handicapped by persons possessing the recognised rehabilitation qualifications, every person whose name is for the time being borne on the Register shall be entitled to practice as a rehabilitation professional in any part of India and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances or any fees to which he may be entitled.

• Rights of disabled that emerge from the Act

(i) To have the right to be served by trained and qualified Rehabilitation professionals whose names are borne on the register maintained by the Council.
(ii) To have the guarantee of maintenance of minimum standards of education required for recognition of rehabilitation qualification by universities or institutions of India.
(iii) To have the guarantee of regulation of the profession of rehabilitation professionals by a statutory council under the control of the Central Government and within the bounds prescribed by the statute.
(iv) To have the guarantee of maintenance of standards of professional conduct and etiquette by rehabilitation professionals against the penalty of disciplinary action and removal from the Register of the council.

• Criticism and suggestions for improving the Act

(i) RCI trains master trainers, rehabilitation professionals and personnels for creating better service delivery facilities for the persons with disability. However, it does not offer any direct benefit, financial or material help to the persons with disability.
(ii) It does not provide any help to the persons with disabilities for their employment. Nor does it perform any intermediary role between various organisations offering employment to the disabled.

(iii) The council is also not responsible to maintain any employment register or coordination with various special employment exchanges.

4.1.3 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation Act), 1995

• Salient features

The Persons with disabilities Act seeks to give effect to the Proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific region. The said Proclamation was made at Beijing on 1st to 5th December 1992 to launch the Asian and Pacific decade of the disabled persons 1993-2002 which was convened by the Economic and Social Commission for Asian and Pacific region.

• The objectives of the disabilities Act broadly are as follows:

(a) To lay down the government’s responsibility for prevention of disabilities, protection of the rights of the disabled, provision for medical care, education, training, employment and rehabilitation of persons with disabilities
(b) To create an environment for the disabled which would have no barriers
(c) To remove any discrimination against persons with disabilities in the sharing of development benefits in relation to non disabled persons
(d) To counteract any situation which abuses and exploits persons with disabilities.
(e) To lay down strategies for comprehensive development of programs and services and equalisation of opportunities for persons with disabilities.
(f) To make special provisions for the integration of persons with disabilities into the social main stream.
(g) Setting up of co-ordination committees and executive committees at the central and State levels to carry out various functions assigned to them.
(h) To appoint a Chief Commissioner for persons with disabilities at the central level and commissioner for persons with disabilities at the State level clothed with the
powers to monitor the funds disbursed by the central and State governments and also to take steps to safeguard the rights of the persons with disabilities.

- **The Central Co-ordination Committee** (CCC)

  The function of the Central Coordination Committee is to serve as the national focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities. It may perform all or any of the following functions, namely:

  (a) review and coordinate the activities of all the Departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to persons with disabilities;

  (b) develop a national policy to address issues faced by persons with disabilities;

  (c) advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to disability;

  (d) take up the cause of persons with disabilities with the concerned authorities and the international organisations with a view to provide for schemes and projects for the disabled in the national plans and other programmes and policies evolved by the international agencies.

  (e) review in consultation with the donor agencies their funding policies from the perspective of their impact on persons with disabilities;

  (f) take such other steps to ensure barrier free environment in public places, work places, public utilities, schools and other institutions;

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8 The CCC consist of the minister in charge of the Department of welfare in the Central Government, Chairperson, ex-officio; the minister of State in-charge of the Department of Welfare, Vice-Chairperson ex-officio; Secretaries to the Government of India in-charge of the Department of Welfare, Education, Women and Child Development, Expenditure, Personnel, Training and Public Grievances, Health, Rural Development, Industrial Development, Urban Affairs and Employment, Science and Technology, Legal Affairs, Public Enterprises, Members, ex-officio; Chief Commissioner, Member ex-officio; Chairman Railway Board, Member, ex-officio; Director-General of Labour, Employment and Training, Member ex-officio; Director, National Council for education Research and Training Member, ex-officio; Three members of Parliament, Three persons to be nominated by the Central Government, Directors of the-(i) National Institute for the Visually handicapped, Dehradun; (ii) National Institute for the Mentally handicapped, Secundrabad; (iii) National Institute for the Orthopaedically handicapped, Calcutta; (iv) Ali Yavur Jung National Institute for the Hearing handicapped, Bombay; Four members to be nominated by the Central Government; Five persons as far as practicable, being persons with disabilities, to represent NGOs which are concerned with disabilities, to be nominated by the Central Government, one from each area of disability, Members; Joint Secretary to the Government of India in the Ministry of Welfare dealing with the welfare of the handicapped, Member-Secretary, ex-officio
(g) monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities;

(h) to perform such other functions as may be prescribed by the Central Government;

State Governments have also constituted State Coordination Committee to exercise the powers conferred on, and to perform the functions assigned to it, under the Act. The function of the State Coordination Committee is to serve as the State focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities.

- **Central Executive Committee**\(^9\) (CEC)

  The CEC shall be the executive body of the Central Coordination Committee and shall be responsible for carrying out the decisions of the Central Coordination Committee. The CEC shall also perform such other functions as may be delegated to it by the Central Coordination Committee. In addition to CEC, State Government has also constituted State Executive Committee which is the executive body of the State Coordination Committee and carryout the decisions of State Coordination Committee.

- **The Chief Commissioner for persons with disabilities**\(^10\)

  The Chief Commissioner shall perform the following functions:

  (a) coordinate the work of the Commissioners;

  (b) monitor the utilisation of funds disbursed by the Central Government;

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\(^9\) The CEC consist of the Secretary to the Government of India in the Ministry of Welfare, Chairperson, ex-officio; the Chief Commissioner; the Director General for Health services; the Director General, Employment and Training; six persons not below the rank of a Joint Secretary to the Government of India; the Financial Advisor, Ministry of Welfare; Advisor(Tariff) Railway Board; four members to be nominated by the Central Government, by rotation, to represent the State Governments and the Union territories in such a manner as may be prescribed by the Central Government; one person to be nominated by the Central Government to represent the interest, which in the opinion of the Central Government ought to be represented; five persons, as far as practicable, being persons with disabilities, to represent non-governmental organizations or associations which are concerned with disabilities, to be nominated by the Central Government, one from each area of disability; Joint Secretary to the Government of India in the Ministry of Welfare dealing with the welfare of the handicapped.

\(^10\) A person shall not be qualified for appointment as the Chief Commissioner unless he has special knowledge or practical experience in respect of matters relating to rehabilitation.
(c) take steps to safeguard the rights and facilities made available to persons with disabilities;

(d) submit reports to the Central Government on the implementation of the Act at such intervals as that Government may prescribe.

(e) look into complaints on his own motion or on the application of any aggrieved person or otherwise into deprivation of rights of persons with disabilities, non-implementation of laws, bye-laws, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities; and take up the matter with the appropriate authorities.

- Rights of disabled under the Persons with Disabilities Act, 1995

The cardinal rights of persons with disabilities which are enshrined in the name of the Act are as follows:

(i) Right to equal opportunity with the non-disabled

(ii) Right to protection of the legal rights of the disabled

(iii) Right to full participation in the affairs of the life at par with those who are non-disabled

(iv) The disabled have been statutorily recognised by this Act and the various forms of disability have been given legal definition.

(v) The disabled have the right to be taken care of and rehabilitated in the mainstream of life in terms of this Act and the Government and other authorities and establishments covered by this Act have an obligation to fulfill their duties toward the disabled in the light of the provisions contained in this Act.

(vi) It is the duty of the Central and State Governments to take preventive steps so that the occurrence of disabilities is arrested, provide training to the staff at primary health centres, improve hygiene health and sanitation measures, screen children at least once a year to identify risky cases, provide for prenatal, perinatal and postnatal care of mother and child and create awareness
amongst the people on the causes and measures to be taken to prevent
disability.

(vii) Every child with disability is entitled to free education in appropriate
environment up to the age of 18 years and the Government should set up
special schools for imparting special education, promote integration of
disabled students in normal schools and provide opportunities for vocational
training to disabled children.

(vii) Disabled children having studied up to fifth class can continue their education
as part-time students, through open schools or open universities and are
entitled to special books and equipments free of cost from the Government.

(ix) It is the Government’s duty to develop new assistive devices, teaching aids
and special teaching material so that disabled children may have equal
opportunities in education. The Government has to set up teacher training
institutions for training children with disabilities and prepare comprehensive
education schemes providing for transport facilities to disabled children to
attend school, provide books, uniforms, other materials to them, scholarships,
restructured curricula and amanuensis for blind students.

(x) There shall be reservation of posts for the disabled up to one percent each for
those who have blindness, impaired hearing or cerebral palsy for which posts
will be identified by the Government every three years. Vacancies not filled
up can be carried forward to the next year.

(xi) All Government educational institutions and aided institutions shall reserve up
to 3 per cent seats for persons with disabilities. Vacancies are to be reserved in
poverty alleviation schemes. Incentives are also to be given to employers to
ensure that 5 per cent of workforce is composed of disabled persons.

(xii) Disabled persons will also be entitled to preferential allotment of land at
concessional rates for housing and for rehabilitation purposes.
(xiii) There shall be no discrimination of the disabled in transport facilities, traffic signals on the road, or in build environments. Neither shall there be any discrimination of the disabled in matters of government employment.

(xiv) The Government will regulate recognition of institutions for the disabled or for those with severe disability.

(xv) The Chief Commissioner and the State Commissioners will look into the complaints with respect to matters relating to deprivation of rights of the disabled.

(xvi) The Government and local authorities shall undertake rehabilitation of the disabled, grant aid to non-Governmental organisations, devise insurance Schemes for the disabled employees and also frame unemployment allowance scheme for the disabled.

(xvii) Those who avail or attempt to avail benefits meant for the disabled in a fraudulent manner are punishable with imprisonment up to 2 years or with payment of fine up to Rs 20,000.

• Criticism of the Act and suggestions for change

Within several years of enforcement since its weaknesses have also surfaced in the absence of powerful instrument for implementation, without the usual indifference thought, the government soon realised these weaknesses and acceded to the demands of the disability movement for an overall review of the Disability Act. A Committee was constituted which harmonised the views of the disability sector and relevant bodies in its comprehensive report. Unfortunately, there have been no concrete proposals in the Indian Parliament for amendments to plus the loopholes in the present Disabilities Act. There are some serious flaws in the Act that have to be set right to ensure equitable distribution of benefits to all.

(1) Unreal definitions:

Though mental illness has been included as one of the seven disabilities, the Act as a whole shows very little understanding of the nature of the disability and
current developments in the field. It appears that the recognition is more by default rather than intent. The very definition of Mental Illness (MI) is more by elimination rather than explanation. For example, by stating that mental illness is other than mental retardation, one wonders whether one should apply the definitional criteria to all mental disorders including epilepsy and disabilities such as dyslexia? It is learned that the amendments to the Act take care of definitional issues by adopting an inclusive rather than an exclusive approach. But until the amendments are incorporated, the ambiguity of definition will persist (Srinivasan: 2002)

(2) Committees and representation issues:

Though the Act recognises seven disabilities, the representation allowed in the Co-ordination Committee and Executive Committee at the central and State levels are restricted to only five members. In other words, the selection of the five should be such that they have full and practical knowledge of all or most disabilities so that justice can be done to all. Lack of sufficient understanding can spell disaster, especially for a disability such as MI where as, very few officials are familiar with the difference between Mental Retardation (MR) and MI. So unless each disability is represented individually, the chances of MI being dropped by the wayside cannot be ruled out in the absence of representation granted to it in the committees.

(3) Other issues:

Conceptually, the Act covers both benefits and rights of the disabled under three main sections- prevention, rehabilitation and integration. In the case of MI, treatment and prevention of relapse is crucial. Seen strictly from an official point of view, the treatment aspects pertain to the Ministry of Health while rehabilitation falls under the purview of the Ministry of Social Justice and Empowerment. So unless the composition of the committees is structured accordingly, MI is likely to be between the two. Sub-Committees for monitoring the Act especially for MI, are required both at the Central and State levels.

The relevance of the above argument is clearly seen in the clause pertaining to employment. The Act has specifically earmarked job reservations of 3 per cent for

11 See Chapter 11, 33.
the Conventional disabilities (1 per cent each for visual, hearing and orthopaedic impairment). It is learned that the amendment to the Act has further expanded this to 5 per cent with the additional 2 per cent for MR, Cerebral Palsy and Autism. Besides reflecting blatant discrimination to MI, it shows deplorable ignorance pertaining to the needs and rights of the disabled. Global experience and research in several nations shows that persons suffering from MI have shown a remarkable rate of functionality after being treated with new drugs. Hence, the paradigm is shifting from illness per se to rehabilitation and integration. Thus PWD Act unfortunately turns out to be an instrument of injustice and discrimination.

4.1.4 The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

- Objects of the Act

The Act provides for the constitution of a national body for the welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities which will be a trust whose object shall be:

(i) to enable and empower persons with disability to live independently and as fully as possible within and as close to the community to which they belong;
(ii) to strengthen facilities to provide support to persons with disability to live within their own families;
(iii) to extend support to registered organizations to provide need based services during the period of crisis in the family of persons with disability;
(iv) to deal with problems of persons with disability who do not have family support;
(v) to promote measures for the care and protection of persons with disability in the event of death of their parent or guardian;
(vi) to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;
(vii) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disability;
(viii) to do any such act which is incidental to the aforesaid objects.

- Creation of National Trust and Board of Trustees
The Central Government has constituted a National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. The said trust will be body corporate having perpetual succession and a common seal with power to hold and dispose movable and immovable property and to contract and to sue or be sued by its name.

The management, general superintendence and control of the trust vest in a Board of trustees consisting of a Chairperson and nine other persons from registered organisations, voluntary organisation or associations of parents of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. In addition, there will be eight persons not below the rank of Joint Secretary to the Government of India from various Ministries and three persons representing associations of trade, commerce and industry. The Chief Executive Officer of the Trust will be an Officer of the rank of Joint Secretary of Government of India who shall also be member-secretary. The Board of trustees may also take in advisors and consultants not exceeding eight in number.
• Powers and duties of the Board or Trustees

It is the duty of the Board to receive from the Central Government the corpus fund of Rs. 100 Crores to be utilised to provide for adequate standard of living for persons with disability from the income from such corpus fund. It shall also have the power to receive bequests of movable property (including money) from any person for the benefit of the disabled. Besides, the Board will receive finance from the Central Government for disbursement to registered organisations for carrying out any approved programme such as for promoting independent living in the community for disabled persons by creating conducive environment, providing counseling, setting up of adult training units, foster care homes, hostels and residential homes, development of self help groups and setting up of Local Level Committees for approving guardians for persons with disability. Preference will be given to women with disability, persons with severe disability and to senior citizens above 65 years age with disability. The Board has to prepare every year annual reports of its activities during the previous year for being sent to the Central Government which shall cause it to be laid before each House of Parliament. It shall also furnish to the Central Government other reports and returns as may be required by that Government. The Central Government can also issue directions to the Board in writing from time to time on questions of policy. The Central Government can also issue notice to the Board asking it why it should not be superseded on complaints received against it. The Central Government can supersede the Board for a period up to six months. The Central Government can also reconstitute the Board.

• Rights of the disabled under the National Trust Act, 1999

(i) The National Trust created by the Central Government has to ensure that the objects for which it has been set up as enshrined in Section 10 of this Act have to be fulfilled.

(ii) It is the obligation of the Board of Trustees of the National Trust to make arrangements for adequate standard of living of any beneficiary named in any bequest received by it, and to provide financial assistance to registered organisations for carrying out any approved programme for the benefit of the disabled.
(iii) Disabled persons have the right to be placed under guardian appointed by the Local Level Committees in accordance with the provisions of the Act. The guardians so appointed will have the obligation to be responsible for the person and property of their disabled wards and be accountable for the same.

(iv) A disabled person has the right to have his guardian removed where the guardian is abusing or neglecting him or is misappropriating or neglecting the property of the disabled person.

(v) Where the Board of Trustees is unable to perform or has persistently made default in the performance of duties imposed on it, a registered organization for the disabled can complain to the Central Government to have the Board of Trustees superseded and/or reconstituted.

1. Criticism of the Act and suggestions for change

(i) Act provides for a legal guardian for people over 18 with mental disability, a term which covers mentally retarded and the mentally ill. However, SC in many of its judgments clearly stated that the mentally retarded do not require such guardians.

(ii) Moreover, the Act does not differentiate between mild or severe retardation (Dogra: 2009).

Radical amendments are proposed to the National Trust Act, 1999. The Act is all set to be amended to include all disabilities and to become an Act on Legal Capacity. Draft of the proposed amendments was discussed in a meeting of the Amendments Sub Committee, the National Trust Board and a few invitees on April 11th 2010. The proposed amendments have changed the earlier definition of disability as mentioned in the Act which only included four disabilities to a more universal and inclusive definition in the line with the Convention.12 Thus, all disabilities will now come under the purview of the National Trust. The proposed amendments have moved away from legal guardianship to the concept of legal capacity. If the

12 However, these amendments are facing stiff opposition from certain quarters. The bone of contention being the definition of disability and the scraping of legal guardianship. Disabled rights activists feel that the definition of disability will have to be universal. However, they also feel that the provisions for legal guardianship should be retained.
amendments are adopted, all disabilities and not just persons with developmental disabilities will have the right to exercise their legal capacity. Persons with all forms of disabilities will be able to avail the supported decision making provisions.

4.1.5 Relevant provisions in labour legislation

- The Workmen’s Compensation Act, 1923

Section 3 says (in brief) that, if personal injury is caused to a workman by accident arising out of or in the course of his employment, his employer shall be liable to pay compensation. As per section 4 of the above Act, where permanent total disablement results from the injury, an amount equal to 60 per cent of the monthly wages of the injured workman multiplied by the relevant factor or amount of 20,000 rupees which ever is more; where permanent partial disablement results from the injury in case of an injury mentioned in Part II of Schedule I, such percentage of compensation which would have been payable in the case of permanent total disablement, in case of injury not mentioned in Schedule such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity. In case of temporary disablement whether total or partial, a half monthly amount payment of the sum equivalent to 25 per cent of monthly wages of the workman is payable (Sarkar: 2010).

- Employee’s State Insurance Act, 1948

Section 46(c) says like this, periodical payment shall be made to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be eligible for such payments by an authority specified in this behalf by the regulations. Section 51 of the same Act states that, Disablement benefit- (a) a person who sustains temporary disablement for not less than three days (excluding the day of accident) shall be entitled to periodical payment of such rates and for such periods and subject to such conditions as may be prescribed by the Central Government (b) a person who sustains permanent disablement, whether

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13 According to Poonam Natarajan, Chairperson of National Trust, post amendments the National Trust will have access to the National Fund for disabilities which amounts to nearly 10,000 Crores of Rupees. This will be a huge boost compared to the mere 100 Crore Corpus that the Trust has been surviving on for the last over 10 years since its inception.
total or partial, shall be entitled to periodical payment at such rates and for such periods and subject to such conditions as may be prescribed by the Central Government.

- The Payment of Gratuity Act, 1972

As per Section 4 of this Act, gratuity shall be payable to an employee on the termination of his employment on his death or disablement due to accident or disease, if he has rendered continuous service of 5 years.

4.2 The WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons.

The previous section dealt with the Indian scenario on disability legislations. Parallel to this study an attempt is made to look into the move in the international sphere also. Being aware of the many barriers to access to information and communication experienced by persons who are blind or have limited vision, or have other disabilities regarding access to published work, a background paper was sent by the Permanent Mission of Brazil on December 10, 2009, on behalf of the Permanent Missions of Ecuador and Paraguay, in relation to a WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons. This section makes a brief study of the purpose and scope of the treaty.

4.2.1 Need for the treaty

The term visually impaired persons refers to blind or partially sighted people. However, when referring to problems of access to published, written works, a more appropriate term is “print disabled” or “reading disabled” people. Print disabled people can read any book a non-print disabled person can read. They do so

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14 According to the WHO, 161 million people worldwide are blind or visually impaired; a further 153 million have an uncorrected visual impairment. 87 per cent live in developing countries.

15 Reading disabled people are all those who, due to an impairment that may be physical, sensory or other, cannot read standard print. For example, a person without sight, a person whose sight is severely impaired a person unable to hold or manipulate books or to focus or move his or her eyes or a person with a perpetual disability. This term includes people with dyslexia and those with dexterity problems which prevent them from turning the pages of a book.

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using so-called “accessible formats”\textsuperscript{16}. Even in the wealthiest markets, less than 5 percent of published works are accessible to persons who are print disabled in the formats mentioned above. This is a “book famine”. Print disabled people have a right to read. Not just a moral right, but one that is spelled out in the UN Convention. To achieve the sharing of accessible books between reading disabled people’s organizations and resolve the problems mentioned above, there is a need for international harmonisation of limitations and exceptions to copyrighted works. An international treaty on copyright exceptions for reading disabled people would be an effective way to do this.

4.2.2 Purpose of the treaty

The purpose of the treaty is to provide the necessary minimum flexibilities in copyright laws that are needed to ensure full and equal access to information and communication for persons who are visually impaired or otherwise disabled in terms of reading copyrighted works, focusing in particular on measures that are needed to publish and distribute works in formats that are accessible for persons who are blind, have low vision, or have other disabilities in reading text, in order to support their full and effective participation in society on an equal basis with others, and to ensure the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.\textsuperscript{17}

4.2.3 Political discussion

The World Intellectual Property Organisation, WIPO, has an important role to play in improving access to published works. In May 2009, Brazil, Ecuador, and Paraguay presented this draft treaty at the WIPO Standing Committee on Copyright and Related Rights (SCCRR 18). The World Blind Union (WBU) was gratified by the widespread support for the treaty proposal from WIPO Member States. There was almost unanimous backing from Latin American Countries. India, China, Pakistan and many others spoke in favour of it too. No country overtly opposed it. However, richer countries did not support it. The EU and so-called “Group B”, industrialised

\textsuperscript{16} These formats do not change the content of a work, but rather the way in which the person reading accesses it. They include large print audio, Daisy [www.daisy.org/]and Braille.

\textsuperscript{17} Article 1 of the WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons.
countries, used the coded wording “premature” in relation to this treaty proposal. When the WIPO Treaty Proposal was first presented at WIPO in November 2008, rights holders opposed it. A diverse group of rights holders organisations put forward a table document which stated clearly the view that “There was no need for new international binding norms restricting the freedom to develop locally adapted exceptions and limitations”. It states:

(i) Copyright exceptions, though their legal nature, do not address the key obstacles to access. The biggest obstacle to wider accessibility is the costs for re-formatting works in VIP charities. A reduction of these costs can only be reached through cooperation with rights holders. A copyright exception is therefore not a suitable tool to achieve the shared objective.

(ii) A copyright exception risks an imbalance. Electronic formats, in particular those easily interpreted even by less sophisticated tools for VIPs, are also most susceptible to abuse and piracy, as they can be used for mainstream products. A broad exception therefore carries a large risk for the authors and publishers.

4.2.4 Rights issue

At par from opposition and controversies, The Convention makes it clear that disabled people have a right to read specifically as enshrined in Article 21, which covers access to information. Article 30 says that copyright law should not create barriers to disabled people. Article 32 of the Convention on “International Cooperation”, calls for States around the world to work together to meet the aims of the Convention. WIPO Treaty represents a tangible example of such cooperation.

II Major issues on disability and suggestions for change

Five issues namely, education, work and employment, health and rehabilitation, right to life, equal recognition as a person before the law and full legal

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capacity are dealt in detail in the following sections. Apart from the problems in the specific issues, suggestions for change have also been made in each issue.

4.3 Education

During the past two and a half decades, the normal trend in providing education for children with disabilities has been to focus on their education in the same setting as their peer groups without special needs. The education that is strongly advocated for children with disabilities is inclusive education. The Convention itself speaks on inclusive education. The term ‘inclusion’ refers to attending the same school as the pupil would have attended in the absence of a significant special need (Prakash 2005:113). It implies a radical shift from segregation, a radical reform of school in terms of curriculum, assessment, pedagogy and grouping of pupils.

In brief, what inclusion means for children with disabilities is:

(a) Educating children with disabilities and those without in the same schools
(b) Providing services, support and advice for parents of all children in regular settings
(c) Training and supporting regular education teachers and administers
(d) Ensuring children with disabilities to follow the same schedules as other children
(e) Encouraging friendships and mutual respect between all children with and without disabilities

Teaching all children to understand and accept differences, be it race, colour, sex, ethnicity, language, nationality, social origin, religion, disability, poverty, birth or other status (Habibi 1999:7)

4.3.1 Evolution of the concept of inclusive education

The concept of inclusive education has been put on the agenda and propelled

19 Though there are constraints at different levels but children need to be included and for this ways have to be explored to remove the constraints (Prakash 2005: 113).
forward by the Disabled Peoples Organisations (DPOs). DPOs have achieved this agenda through organised political pressure and mobilising allies. As a result, progress towards inclusive education though slow has been steady over the last twenty-five years. A historical analysis of international documents gives clear evidence of this conceptual shift in thinking. While the UN Declaration on the Rights of Disabled Persons (1975)\textsuperscript{20} focused on assisting the disabled individual to develop activities, capabilities, and self-reliance for functioning in normal life, the Dakar Final Report on Education for All Progress since Jomtein\textsuperscript{21} (2000) pointed out that instead of focusing on preparing children to fit into existing schools, the new emphasis focuses on preparing schools so that they can deliberately reach out to all children (UNESCO 2002: 16-21).

Since 1999, momentum for disability rights has grown exponentially. In 2001, the UN Commission on Human Rights passed resolution 2000/51 on Human Rights of People with Disabilities. The Commission set out a number of specific procedures whereby States must improve the rights of disabled people, including their right to inclusive education.\textsuperscript{22}

Besides these movements, several world congresses have also passed resolutions, and declarations, with relevance to inclusive education. These include:

- Beijing Declaration on Rights of People with Disabilities in the New Century (2000)\textsuperscript{23}
- Declaration of the World Assembly in Sapporo (2002)\textsuperscript{24}
- Declaration of Biwako (2002)


\textsuperscript{21} The World Education Forum, held in Dakar from 26 to 28 April 2000 was the culminating event of the decade of Education for All (EFA) initiated in Jomtien, Thailand in 1990.

\textsuperscript{22} Resolutions are available at \url{www.unhchr.ch}

\textsuperscript{23} Beijing Declaration adopted on 12 March 2000 at the World NGO Summit on Disability. Beijing, People's Republic of China, available at URL: \url{http://www.rehab-international.org/about/BeijingDeclaration.html}

\textsuperscript{24} Sapporo Declaration, October 2002, available at \url{http://www.dpi-japan.org/8wa/declaration2002e.html}
Several of these declarations have brought to the attention of the United Nations the need to constitute a Special Convention on the rights of disabled people.28 Despite these successes, gaps remain in the existing scenario. The EFA Global Monitoring Report (2002) is silent on disability issues and makes no mention of progress towards inclusive education for children and youth with disabilities and special education needs.

4.3.2 International standards.

Education was included in the Universal Declaration of Human Rights as Article 26 and in the International Covenant on Economic, Social and Cultural Rights as Articles 13 and 14 as the human right to education. This means that education is regarded as something that is necessary for all human beings at all times in all societies and that the State is responsible for fulfilling this right for everyone (Halvorsen 1990: 341).29 The World Declaration on Education for All (2000)30 affirmed the notion of education as a fundamental right and established the new millennium goal to provide every girl and boy with primary school education by 2015. In addition, various international instruments reiterated the educational dimensions from various angles.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) addresses the gender-based discrimination in relation to education
and enjoins State parties to ensure that the women and girls receive education on the basis of equality with men.\textsuperscript{31} Further, the Convention on the Rights of the Child (CRC) addresses education in two articles. Article 28 focuses on access to education and Article 29 about the aims and content of education. In the context of children with disabilities, Article 23 of CRC places a clear obligation on State parties 'to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development including his or her cultural and spiritual development'. The Committee on the Rights of the Child in General Comment No.1 outlines the scope of Article 29(1), which is more than an inventory or listing of different objectives which education should seek to achieve. It makes an encompassing analysis of the right to education, which takes within its sweep the objectives in Article 23 for children with disabilities.

\textbf{4.3.3 Domestic standards}

The Constitution of India not only recognises the right to education as a fundamental right in its Article 21A, but also emphasises its importance for the vulnerable and weaker sections like the disabled in Article 41 of the Directive Principles. With the Eighty-sixth Amendment, the right to free and compulsory education has become a fundamental right. Originally, this right was part of the Directive Principles of State policy under Article 45. Another noteworthy aspect of this amendment is that the fundamental right to education has been arranged as an extension of the right to life. Article 21A states:

\begin{quote}
The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.
\end{quote}

The Eighty-sixth Amendment has brought another important facet of education, that is, early or pre-school education under the constitutional framework.

\textsuperscript{31} Article 10 says:
State parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education.
The amended text of Article 45\textsuperscript{32} reads as follows:

The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

This provision is of particular relevance for children with disabilities. These amendments are not only important from the perspective of an individual right but they have enlarged the scope of duties both for the States and citizens. The duties of citizens outlined in Article 51 A of the Constitution now also include the following:

It shall be the duty of every citizen of India-

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case maybe, ward between the age of six and fourteen years.

Education being a subject in the Concurrent List, both the Government of India and the State governments has designed strategies to help disabled persons. The concept of inclusion and integration is being implemented as a legal requirement in India by various legislative, executive and administrative means.

Chapter V of the Persons with Disabilities Act, 1995, entitled ‘Education’ is of great significance.\textsuperscript{33} The Act not only guarantees free education up to the age of eighteen years in an appropriate environment but also casts a positive duty on the appropriate governments to promote integrated education as well as special schools. Section 26 of the Act stipulates,

The appropriate governments and the local authorities shall

(a) ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of 18 years.

(b) endeavour to promote the integration of students with disabilities in the normal schools.

\textsuperscript{32} Subs. by the Constitution (Eighty-sixth Amendment) Act, 2002 for “Article 45: Provision for free and compulsory education for children. The article reads as follows: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years" (Jain 2003: 1623).

\textsuperscript{33} Sections 26 to 29 of the PWD Act deals with 'Education'.
(c) promote setting up of special schools in government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools and endeavour to equip the special schools for children with disabilities with vocational training facilities.

However, the historical context\(^{34}\) and the 1995 Act itself outline that India has at present a ‘two track’ system. The centrally sponsored scheme for integrated education for disabled children (IEDC) was introduced only in 1974.\(^{35}\) A cardinal feature of the scheme was liaison between regular and special schools to reinforce the integration process, which did not take shape. In addition, other models of integrated education were also introduced on an experimental basis in India.

National Council of Educational Research and Training (NCERT), playing an advisory role to the government of India, joined hands with the UNICEF and launched the Project Integrated Education for the Disabled in the year 1987. IEDC was later amalgamated as a component with major basic educational projects such as the DPEP funded by the World Bank in 1997 and Sarva Shiksha Abhiyan (SSA), a project taken as a mission made to achieve the goal of Universalisation of Elementary Education (UEE).\(^{36}\)

The coverage, under the IEDC scheme, has been minuscule and goes on to show that integration has been a slow process in the country since 1974.

4.3.4 Problems in India

Historically in India, the education of children with disability has not been the responsibility of the nodal Ministry of Education or the Ministry of Human Resource

\(^{34}\) Concern for the education of disabled can be traced back to 1944, before India achieved independence. The Central Advisory Board of Education published that year the comprehensive report called the Sargent Report. According to this Report, handicapped children are to be sent to special schools only when the nature and extent of their defects made it necessary. In 1964 Kothari Commission (1964-66), the first education commission, brought up the issue of children with special needs in the Plan of Action and again gave strong recommendations for inclusion. Despite these early reports, trends in India however reflect that the leading policy predisposition before 1970s has been that of segregation (Julka 2006:97-115).

\(^{35}\) The aim of IEDC was

- To provide educational opportunities to children with special needs in regular schools
- To facilitate their retention in the school system
- To place children from special schools in common schools.

\(^{36}\) For more details See (Chadha 2002), Inclusive Education in DPEP, Journal of Indian Education, Special Issues on Education of Learners with special needs, New Delhi: NCERT.
Development. Instead, it has been the responsibility of the Ministry of Social Justice and Empowerment. This has led to the emergence of a dual system of education. With the Ministry of Social Justice and Empowerment largely supporting the voluntary sector to provide educational services to children with special needs, most voluntary organisations concerned with rehabilitation have run special schools alongside other rehabilitation services and programmes.\(^{37}\) The special education system has grown unregulated and unrecognised. The system has grown haphazardly, has not followed the national curriculum, teachers are not at par with teachers in general schools and there has been little or no perception in what and how to teach.

In 2005, ninety per cent of children with a certain disability had no access to any kind of education, be it the special or general. It is more tragic because this has happened despite the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which mandates the right of every child with disability to have access to free education in an appropriate environment till the age of 18.

By 86th Amendment Article 21 A has made Education as a fundamental right for all citizens of India. A much needed effort came to fruition after a long debate and activism. However, persons with disabilities (including children) have been left out of the ambit of this very essential right. Right to Education under the Convention goes beyond Article 7 (Children) and Article 24 (Education). The Convention does not look at each article in isolation, it reiterates at every step indivisible, interrelated and interdependence of each article. Equality and Human Rights is perceived in and through Education. The State cannot merely provide educational services with possibilities of discrimination where there are no accessible facilities, no sign language interpretation, Braille books, etc. Section 3(2) of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act 2009) points children with disabilities referring to the definition of disabilities under the Persons with Disabilities Act 1995. There are many problems with this approach.

\(^{37}\) This is the reason why we have separate schools for children with vision impairment, hearing impairment, intellectual disability, multiple disability and now autism. The latest figures cite 3500 such schools in the country (Alkazi 2006:75).
Firstly PWD Act defines only 8 categories of disabilities, leaving out scores of other disabilities like Autism, muscular dystrophy etc. This is contrary to the Convention which aims to “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”, rather than the policy of exclusion of PWD Act by listing about 8 categories of disabilities and leaving out the rest [Article 1: Purpose]

There need not be any reference to disability in the disadvantaged groups. The RTE Act had to be all inclusive stating that all children have a right to education in Article 3 of Chapter II of the RTE Act without relegating children to the PWD Act. Section 2 (n) enshrines different categories of schools for the children “a school belonging to specified category”. Section 2 (p) further defines “specified category” in relation to a school, means a school known as Kendriya Vidyalaya, Sainik School or any other school having a distinct character which may be specified by notification, by the appropriate Government. Section 2 (n) gives sanctity to the Section on Education in the PWD Act: The appropriate Governments and the local authorities shall -

- ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;
- endeavour to promote the integration of students with disabilities in the normal schools;
- promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;
- endeavour to equip the special schools for children with disabilities with vocational training facilities.

This would legalise all kinds of segregationist endeavors of the governments. RTE Act overlooks the fact that there is a great need for inclusion of children with disabilities in mainstream schools, and not to create excuses for segregation. Why do children with disabilities admit to such discrimination when the Convention mandates that States Parties shall ensure that:
• Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
• Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
• Reasonable accommodation of the individual’s requirements is provided.
• Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
• Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.
• Also what needs to be noted is such exclusion would mean that children with disabilities would be denied the right to 25 per cent reservation. It is a preposterous notion that a school with State funding is selective in its admission criteria, thus legitimising inequality through a multi-layered schooling system.

Also Section 2 (o) refers to screening procedures, this subscribes to a diagnostic method wherein children would be labelled by their disabilities and thereby segregated into special schools.

RTE Act defines compulsory education as an obligation of the government to:

• provide free elementary education to every child of the age of six to fourteen years; and
• ensure compulsory admission, attendance and completion of elementary education by every child of the age of six and fourteen years.

This dilutes the Fundamental Right of children below six years and denies right to secondary and senior secondary education. The Convention looks at education as “lifelong learning without discrimination and on an equal basis with others” looking beyond primary, secondary education, even vocational and tertiary educations
are recognised. The Convention mandates that teachers are “qualified in sign language and/or Braille,” and use “appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities”. Sadly this is lacking in Chapter IV of the RTE Act, thereby implying indirectly that education of children with disabilities is matter for special educators to handle in a special school.

The Convention recognises Braille as a vital source of communication for Blind and Deaf. They are defined in Article 2 “Communication” and re-iterated in every other article under Accessibility 9 (2) d; Article 21 recognises Braille as a means to freedom of expression in a script of choice. Education under the PWD Act has created a vast number of educated deaf and blind persons who are not able to read independently as there are no braille facilities like books available easily. Sign language denotes linguistic identity and signifies deaf culture in Article 30 and is repeated in every article including Article 24. Education is not only learning new things but also expression of ideas and creativity; sign language provides the means to this (Singit: 2010).

Education is a right of persons with disabilities and not a concession that is doled out. The RTE Act, 2009 must recognise this fact.

4.3.5 Suggestions for change

The inadequacies in the existing laws are taken care of and suggestions\(^{38}\) are made to enhance the rights protection of persons with disabilities. This section is viewed under four heads.

- Policy initiatives

(i) The education of children with disabilities as also persons with disabilities should be within the jurisdiction of the Ministry of Human Resource Development instead of the Ministry of Social Justice and Empowerment.

(ii) There should be provision for incorporating a component on disability in the B.Ed course and a module on special education of children with intellectual

\(^{38}\) Suggestions are studied based on the Report Harmonising Laws with the Convention, May 2010.
and developmental disability as also children with learning disorders should be added in the B.Ed course.

(iii) A module on sign language should also be a part of B.Ed course in order to equip teachers to teach students with hearing impairment both in special and mainstream schools.

(iv) The pay scale and facilities to special educators and teachers should be equivalent to other teachers in Government.

• Legislative changes

(i) The focus of education for persons with disabilities should not be restricted to education in schools alone but should extend to higher education and allow for life long learning and skill development.

(ii) All children and adults with disabilities should receive free and compulsory education till the age of 21 irrespective of their physical, sensory or cognitive impairments.

(iii) There should be an explicit provision prohibiting schools and educational institutions from denying admission to a child or person with disability or to remove such child or person with disability on the ground of his or her disability. The infringement of this prohibition should make the school or educational institutions liable to penal sanctions.

(iv) In order to provide a proper system of checks and balances the law should mandate guidelines to be framed for every institution catering to the disabled such as educational, rehabilitative, employment related care facilities and the like with an inbuilt provision for derecognition and penal consequences for any abuse.

(v) 5 per cent seats are to be reserved for persons with disabilities starting from the primary level to higher education.
(vi) Children/students with disabilities to be provided with reasonable accommodation by the school/educational institutions at all stages including the process of admission, interview, selection, teaching, examinations, etc.

(vii) There should not be a total embargo on persons with disabilities from studying a particular subject or discipline, where ever such education is possible with reasonable accommodation and technological support, the same should be made available to persons with disabilities. On the same rationale, if even with technological support, and reasonable accommodation, person with disability is unable to pursue a particular discipline or subject, then a provision for seeking exemption should be made. Also options for alternative modes of completing school leaving education should be available for persons with disabilities with an appropriate system of evaluating and monitoring the alternative system.

• Rules, regulations and guidelines

(i) A separate set of guidelines may be issued to specify the various forms of Reasonable Accommodation required to be provided by schools/educational institutions.

(ii) Relaxation of upper age limit for persons with disabilities in all professional courses including competitive examinations.

(iii) Use of assistive technology to facilitate the process of learning of persons with disabilities.

(iv) Rules which permit the use of scribes for people with disabilities who may require such support due to their sensory, physical, cognitive impairments and provisions for use of alternative assistive technology (eg. Computers) for students with disabilities to write examinations

(v) Mainstream schools to allow and promote the use of alternative and augmentative communication (AAC) for those students with disabilities who are in need of such kind of support.
A combination of sign language and other modes of communication to be used as the medium of instruction in school and higher education for students with hearing impairment. Indian Sign language will however be the preferred mode of imparting training and instruction for the hearing impaired.

• Schemes and programmes

(i) Provisions should be made to provide inclusive education in mainstream schools as well as special schools to support the requirements of those persons with disabilities having high support needs and ensure that such schools provide the environment conducive to inclusion.

(ii) All mainstream government/government aided and private educational institutions are to be made structurally/physically accessible for persons with disabilities with provisions like ramps, accessible toilet, audio signals, signage etc. All educational institutions to follow the National Access Code\(^{39}\) and further be certified as being 'barrier-free'.

(iii) Mainstream schools to allow and promote the use of alternative and augmentative communication (AAC) for those students with disabilities who are in need of such kind of support.

(iv) Provisions are to be made for activity centers for those persons with disabilities with high support needs after they cross school leaving age.

(v) Resource centers to be created to support mainstream school teachers.

(vi) Schemes to provide effective individualised support measures that maximises the academic and social development of persons living with mental illness and which address the specific needs of persons living with mental illness in negotiating the social environment.

(vii) Schemes that allow the launch of individualised educational programme

\(^{39}\) As suggested in the chapter on Accessibility.
designed to meet the unique educational needs of a single child in the least restrictive environment wherever required to realise the educational rights of persons with intellectual and developmental disabilities.

(viii) Programmes that ensure life long learning for people living with mental illness by providing facilities for general tertiary education, adult education and vocational training.

4.4 Work and employment

Understanding the employment experience of persons with disabilities is particularly important in India given that in 1995, the Indian Government passed the PWD Act, which is the most important legislation regarding the employment of persons with disabilities. The Act has specifically earmarked job reservations of 3 per cent for the conventional disabilities (1 per cent each for visual, hearing and orthopaedic impairment). Problems faced by the disabled in the employment sector are in fact multifaceted. Broadly, they fall under the following heads:

- Having a disability is always associated with lower earnings for those persons with disabilities who work (Gooding 1994).
- Even when disabled individuals are working, they are often apt to be working fewer hours than others.
- Problems of access to the physical environment, including transportation, housing and workplaces coupled with still held prejudices among many employers, co-workers and the general public, aggravate an already difficult situation.

The intricacies involved in the employment sector are dealt in detail in this section.

4.4.1 International standards

The right to work is recognised as a fundamental right under several international legal instruments, especially the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right is the basis of ensuring economic independence and protecting human dignity. It implies the right of every citizen to freely choose his/her employment and in this way it is synonymous with 'the right to
livelihood’ (NHRC 2005:123). The ICESCR enunciates the right to work in a general sense in its Article 6 and explicitly develops the individual dimension of the right to work through its recognition in Article 7 of the right of everyone to the enjoyment of just and favourable conditions of work. Hence, Articles 6 and 7 have to be read in conjunction with the guarantee of non-discrimination contained in Article 2(2) of the ICESCR.

These objectives reflect the fundamental purpose and principles of the United Nations, as defined in Articles 1(3) and 55 of the Charter of the United Nations. The essence of these objectives is also reflected in Article 23 (1) of the Universal Declaration of Human Rights, which reads thus: “Every one has the right to work and to protection against unemployment”.

Since the adoption of the ICESCR by the General Assembly in 1966, several international and regional instruments have also recognized the right to work. They are enumerated in Article 5 (e) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and in Article 11 1(a) of the Convention on the Elimination of Discrimination against Women. Several regional instruments recognize the right to work in its general dimension, including the European Social Charter of 1961 as amended, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [Article 6], which recognize the principle that respect for the right to work

40 Article 5 (e) (i) of the International Convention on the Elimination of All Forms of Racial Discrimination: “.... State Parties undertake to prohibit and to eliminate racial discrimination in all its form and to guarantee the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... the right to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.

41 Article 11 1(a) of the Convention on the Elimination of Discrimination against Women “... in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) the right to work as an inalienable right of all human beings.”

42 European Social Charter, Article 1, as amended: With a view to ensuring the effective exercise of the right to work, the parties undertake:
1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment.
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon
3. to establish or maintain free employment services for all workers
4. to provide or promote appropriate vocational guidance, training and rehabilitation.

43 American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 6 reads as follows:
imposes on States parties an obligation to take measures aimed at realization of full employment.\textsuperscript{44}

The Committee on Economic Social and Cultural Rights (CESCR) has addressed a number of aspects of the right to work for persons with disabilities in General Comment No. 5.\textsuperscript{45} The CESCR has criticized the practice of providing employment to persons with disability in the sense that they are segregated from the mainstream which is against their right to equality. The CESCR observed that the right recognized in Article 6(1) of the ICESCR to the opportunity to gain one's living by work, which one freely chooses or accepts is not realised where the only practical option for workers with disabilities is employment in 'sheltered' facilities offering sub-standard conditions.\textsuperscript{46} Likewise, this right may be violated where those with certain kinds of disability are effectively confined to work in certain spheres. Similarly, in the light of Principle 13 (3) of the Principle for the Protection of Persons with Mental Illness and for the improvement of Mental Health Care, 'therapeutically treatment' in institutions which amounts to forced labour is also incompatible with the ICESCR.

The CESCR has also drawn attention to the need to ensure that there are no physical or other barriers preventing access by persons with disabilities to places of work. It has further stressed the need for accessible transport to and from workplaces, and underlined the requirement that persons with disabilities have access to integrated training and vocational programmes and not to be discriminated against in relation to rates of pay and other conditions of employment.

Rule 7 of the Standard Rules also deals with a detailed elaboration of several aspects of the right to work, including the following:

1. Everyone has the right to work, which includes the opportunity to secure the means of living a dignified and decent existence by performing a freely elected or accepted lawful activity
2. The State parties undertake to measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects in particular those directed to the disabled. The State parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

\textsuperscript{44} For more information, see (Economic and Social Council 2003).
\textsuperscript{46} See CESCR General Comment 5, Para 21.
(a) Requiring that law and regulations in employment field must not discriminate against persons with disabilities or raise obstacles to their employment [Rule 7(1)].

(b) Calling on States to support actively the integration of persons with disabilities into open employment [Rule 7(2)].

(c) Calling on State parties to provide support for the redesign or adaptation of workplaces to ensure accessibility, and the development of new technologies and assistive devices to enable persons with disabilities to gain employment [Rule 7(3)].

(d) Calling on State parties to play an active role as an employer to promote the employment of persons with disabilities, as well as taking steps to combat prejudices and stereotypes about persons with disabilities [Rule 7(4) and (5)].

(e) The main aim should always be for persons with disabilities to obtain employment in the open labour market. For persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be alternative. It is important that the quality of such programmes be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market [Rule 7(7)].

In addition to the provisions contained in the ICESCR, the CESCRs' General Comment, and the Standard Rules, the ILO has also contributed a set of important international conventions and recommendations related to the right to work for persons with disabilities.

4.4.2 ILO Conventions and Recommendations

The first international instrument containing provisions relating to the vocational rehabilitation of workers with disabilities was adopted by the International Labour Conference in 1925 (Recommendation No.22).

In 1944 the International Labour Conference adopted comprehensive Recommendation No. 71. The ILO stated that the disabled workers, “Whatever the

47 See also (Marks and Andrew 2005:114).
origin of their disability, should be provided with full opportunities for rehabilitation
specialised guidance, training and retraining and employment on useful work”. Even
though this Recommendation did not refer to gender differences, it underlined the
‘complete equality of opportunity’ for men and women. After this, there has been a
plethora of legal products adopted by the ILO to facilitate employment of disabled
people. In 1946 Convention Nos. 77 and 78 and Recommendation No.79 established
the corrected medical measurement for vocational guidance and rehabilitation of
people with disability. Recommendation No.83 and Convention No.88 were
established in 1948 calling for special measures to comply with the needs of workers
with disability.

Recommendation No.99, adopted in 1955, has become one of the most
important international instruments in the field of employment for people with
disability. It served as the basis for national legislation and practice in relation to
vocational guidance, vocational training and placement of disabled persons. In 1958
the ILO again emphasised its anti-discrimination stance through the adoption of
Convention No.111 and Recommendation No.111 concerning Discrimination in
Employment and Occupation, which outlined policies of non-discrimination in the
equal opportunity and treatment in employment. Owing to the increase of
technological changes in 1965, the ILO issued a Resolution concerning techniques
used in the rehabilitation and training of disabled persons for new forms of
employment. This was followed by ILO Convention No.128 in 1967, which requires a
provision of rehabilitation services to training a disabled person for resumption of
previous activity having regard to aptitudes and capacity. In 1968, with the Resolution
of the International Labour Conference concerning disabled workers, the ILO
confirmed its commitment in progressing policy on vocational rehabilitation and in
eliminating all discrimination. ILO Convention No.142, in 1975, called on member
States to develop comprehensive policies of vocational guidance and training linked

48 ILO recommendation added that persons with disabilities should, wherever possible, be trained with
other workers, under the same conditions and the same pay, and called for equality of employment
opportunity for disabled workers and for affirmative action to promote the employment of workers
with serious disabilities. (Employment (Transition from War to Peace) Recommendation No. 71,
1944).
was built on the core provisions of earlier instruments in relation to Vocational training, equality of
opportunity and equal pay for equal work ( ILO 2003).
50 See ILO Human Resources Development Convention (No 142), 1975.
with public employment services. Finally, in 1983 the ILO adopted its landmark Convention No. 159\textsuperscript{51} and the accompanying Recommendation No.168, which set out a number of fundamental principles to underlie vocational rehabilitation and employment policy and detailed measurements that should be taken to promote equitable employment opportunities.

In November 2001, the ILO adopted the Code of Practice on Managing Disability in the Workplace. It was intended to guide employers to adopt a strategy in managing disability related-issues at the workplace. Although it is primarily addressed to employers, the document notes that “governments pay an essential role in creating supportive legislative and social policy framework and providing incentives to promote employment opportunities for people with disabilities”.

In order to increase employment for persons with disabilities, governments of several States have taken various measures. While such policies dated back much earlier in several States, some others have been encouraged by ILO Convention No.159 of 1983. It was felt that operational measures are needed in addition to laws in order to create greater employment opportunities for disabled persons. Quota systems\textsuperscript{52} are an example of measures that have been taken by several States in order to ensure that a number of jobs are available for people with disability. Such systems call for employers to employ a minimum percentage of disabled workers.

**4.4.3 Domestic standards**

The fundamental right to equality under Article 14 of the Constitution of India plays an important role for the disabled. This form of substantive equality has two implications. First, it rules out any denial or discrimination against any individual or class, on any arbitrary or unreasonable basis. Secondly, it permits ‘affirmative action’ by way of special laws creating special rights and ‘positive discrimination’ by way of creating reservations in favour of the weaker sections of society.\textsuperscript{53}

\textsuperscript{51} See ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No 159), 1983.
\textsuperscript{52} In addition to quota system, other legislative measures include designated employment schemes, reservation of posts, allocation of priorities and preferences, compulsory notification of vacancies.
\textsuperscript{53} Author is of the view that the right of persons with disabilities against any discrimination is within the mandate of Right to Equality under Article 14 of the Constitution and it is under this constitutional mandate of equality that even before the disability statutes were passed many persons
The Constitution of India under the purview of Articles 15 and 16 guarantees the right to equality in specific areas. In the absence of an expressed reference to disability, the major doubt was whether these articles are applicable to the rights of disabled. However, the right was set to rest by the Supreme Court in Indra Sawhney v. Union of India. Affirming that, reservations, in favour of persons with disabilities are covered under Article 16(1), Supreme Court in his case said:

Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preferences in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens.

Extending this line of thinking to the context of persons with disability, the Court held:

To enable all to compete with each other on equal plane, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the fortunate advantaged. Articles 14 and Article 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them.

In addition to Fundamental Rights under Part III of the Constitution of India, Article 41 of Part IV of the Constitution obligates the State to ensure the right to work subject to its economic capacity and development.

Employment rights of persons with disabilities are mainly covered under Chapter VI of the PWD Act containing Sections 32 to 41 [except Section 39]. These provisions pertain to various aspects through which the employment rights of disabled persons in the government sector are to be facilitated. In addition, the right against discrimination in government employment is incorporated into Section 47 under Chapter VIII titled ‘Non-discrimination’. Disabled person’s employment in the

with disabilities, their organisations or petitioners in public interest successfully approached the Supreme Court and High Courts in the country under Articles 32 and 226 of the Constitution for their right to equality and right against arbitrary discrimination (Pandey 2005: 3).

54 AIR 1993 SC 477; 1992 Supp (3) SCC.
55 There were conflicting views among different High Courts regarding the co-relation between sections 33 and 39 of the PWD Act.
private sector has also been provided for in Section 41 of the Act while self-employment opportunities for disabled persons have been bolstered through certain affirmative actions in Section 43. As per Section 32 of PWD Act, it is the obligation of the appropriate Governments both at the Centre and State to identify posts in their establishments which can be reserved for persons with disabilities. Once such identification of posts has been done, the government has to review the list of posts every three years taking into account the development in technologies. Accordingly, a direction has been given to every appropriate government to reserve at least 3 per cent of vacancies in every establishment in such a manner that 1 per cent of such vacancies/posts shall be reserved for persons suffering from blindness or low vision, 1 per cent for those having hearing impairment, and 1 per cent for those having locomotor disability or cerebral palsy in respect of posts identified for each disability.\textsuperscript{56}

The government introduced reservation for persons with disabilities in 1977 for the first time in the case of direct recruitment to Groups C and D posts. Reservation for persons with disability in direct recruitment is now available in Groups A and B posts also.\textsuperscript{57} (Banerjee 2005:188). University Grants Commission (UGC) has not only reserved 3 per cent seats for admission to persons with disabilities in various courses offered by colleges and universities but also in jobs in those colleges and universities.\textsuperscript{58}

\subsection*{4.4.4 Problems in India.}

A careful reading of the provisions dealing with employment in the PWD Act itself reveals several gaps. It is evident that the Act does not grant the right to employment to every disabled person according to the already limited definition of persons with disabilities under the Act. At present, employment rights are available only to those persons who come within the three stated categories of disabilities, namely, low vision, hearing impairment and locomotor disability. Persons with mental illness and mental retardation are expressly excluded from the purview of the

\textsuperscript{56} Reservation shall be made in Groups 'C' and 'D' posts for the physically handicapped at the same percentage for the specified three categories. Source: (Muthuswamy and Brinda 1999: 536).

\textsuperscript{57} The Government of India has announced such reservation in recruitment to posts in All India Services for persons with disabilities also.

\textsuperscript{58} The University Grants Commission has issued necessary instructions in this regard vide its DO letter No.11/5/95 (CEP-II) (Vol.II) dated 18.7.2001.
employment provisions, even though these persons are also included among the seven categories of disability. Under this closed three-category approach, there is the provision for identification of jobs in government establishments, which can be reserved for them.

Apart from all these, reservation of vacancies is mandated only in government establishments—a sector that is shrinking fast in the country. Even within the government sector, there is an exemption clause, which allows the government to exclude organisations from the purview of the provisions for reservation and non-discrimination at the workplace. As for the private sector, the incentive provision has been made conditional to the governments ‘economic capacity and development’. The incentive policy has not been formulated till today and, therefore, Section 41 remains a dead letter, though some civil society organisations have drafted an incentive policy and are in the process of lobbying with the government to adopt it.

It could be argued that reservation in the private sector may be attacked on the ground that it damages the basic structure of the Constitution of India, for the private sector entities being fully at liberty to employ people according to their choice. In order to take care of the ‘basic structure argument’, Article 46 of the constitution has to be amended to read as follows:

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and the physically and mentally handicapped, and shall protect them from social injustice and all forms of exploitation.59

The identification of posts is yet another area that is required to be revamped. The process of job identification that the law has adopted places emphasis on the functional approach to disability from the viewpoint of non-disabled persons. The functional capacity of the person with disability is therefore evaluated and the posts are identified according to the perception of non-disabled persons, without due consultation with individuals experiencing disability.

59 ‘Physically and mentally handicapped’ has to be added to the existing text.
Further, even in cases where a disabled person has been employed under the 3 per cent quota of the Act, the discrimination and hostility faced on the job is so severe that there either the person is forced to consider resignation, or his performance is so adversely affected that the job is terminated or promotions are categorically denied.60

4.4.5 Suggestions for streamlining effective implementation.

- Legislative changes

(i) 5 per cent reservation for persons with disabilities: Explicit provisions need to be made providing at least 5 per cent reservations in jobs both in public as well as private sector and not only on identified jobs but total cadre strength of the organisation.

(ii) In implementing the entitlement of reservation the list of identified posts should be treated as guideline and not as an exhaustive list. This would enable persons with disabilities to apply for and be employed in posts other than identified posts in case they are suitable and qualified.

(iii) In the proposed amendments put forward by the Ministry, reservation in appointments has been restricted to direct recruitments only. It is necessary that all forms of appointments/employment opportunities be included in the purview of reservation that is, direct and indirect appointments, promotion, vacancies filled by deputation, contractual appointments, etc.

(iv) The reservation in all categories i.e. A, B, C & D should be based on total existing cadre strength and not merely on the identified posts or the number of vacancies being filled at a particular point of time.

(v) Candidates selected on their own merits should not be judged against the reserved vacancies, however they will be entitled to all benefits and reasonable accommodations at all stages of recruitment and employment.

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60 Pointing the lacunae, it has to be noted the shocking reality that it is the employers who display extreme insensitivity even where law has not failed, there by defeating the existing provisions (Pandey 2005: 104).
(vi) Reservation should extend to public private organized sectors: Attractive incentives and awards should be given for both private and public sectors to promote inclusive employment. Provisions of Grants/help for infrastructure accessibility can be made to make the private workplace accessible.

(vii) Posts not to lapse: In no case the post reserved for persons with disability should be allowed to lapse in favour of general category.

(viii) Specific provision debarring a post reserved for a disabled person from being restricted to any other categories.

(ix) Filling the backlog vacancies should also form part of Act in a limited time frame from the day the new law is brought into force. A mechanism for fixing responsibility together with penal provisions should be envisaged.

(x) Provisions for self-employment, entrepreneurship, setting up of cooperatives and one’s own business to be made in the law to support persons with disabilities for being independent.

(xi) Special employment exchange to be merged with the General employment exchange and re-created as a separate division therein. It is the experience of several persons with disabilities that the special employment exchange does not function as it was designed to a few people, if at all, have benefited and found jobs through the Special Employment Exchange.

(xii) Provisions of liaison officers in each department/ministry/PSU/Corporation/employing organisation/educational institution etc should be made mandatory who would be focal point for the redress of grievances of employees with disabilities and to ensure monitoring and implementation of the disability related provisions in the law.

- Rules and regulations
(i) All government departments/PSUs/local and statutory authorities should compulsorily forward vacancies within 10 days of their arising to the Special Employment Exchanges.

- Schemes and programmes

(i) There is no provision to monitor the representation of women with Disabilities in employment which calls for launching of Special drives to recruit women with disabilities.

(ii) Job retention and return to work programs for persons with disabilities particularly persons living with mental illness who had to temporarily take leave of absence from their work.

(iii) There should be schemes where by employers may be obligated to provide assistive aids and devices to their employees with disabilities either free or on concessional basis.

4.5 Health and rehabilitation

The present health care services for people with disabilities are not in a wider and integrated perspective. There are over 110 million people with moderate or severe disabilities in the rehabilitation or simple technical aids. About 70 million of them need rehabilitation services and remainder needs periodic empowerment. 61 Disability services in developing countries fall short of demand in both quantity and quality. The potential demand remains hidden perhaps because of lack of awareness or discouragement from the dearth of services. Demand could also be low because people have low expectations of the benefits of the services, such as the benefits of rehabilitation to disabled girls and women.

4.5.1 International standards

The right to health was formally recognized in the Universal Declaration of Human Rights in its Article 25 as follows:

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61 For more details visit http://www.socdev/enable/rights/documentsun.org/esa/ahec6idcda21inefoshet2.doc
Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness and disability... (G.A Res.217A).

Article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR) provides that the State parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (G.A Res.2200). Similar provisions are found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

Two Rules of the Standard Rules relate directly to health: Rule 2 on medical care and Rule 3 on rehabilitation. Rule 2 focuses on equal quality of medical services for persons with disabilities, access to treatment or medicines necessary to improve levels of functioning, and adequate training of medical professionals. Rule 3 addresses the accessibility, design and content of rehabilitation programmes to meet the actual needs of persons with disabilities.

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care addresses issues related to the right to health in Principles 6-14 and 22. These principles cover confidentiality, role of community and culture, standard of care, treatment, medication, consent to treatment, notice of rights, rights and conditions in medical health facilities, and resources for mental health facilities. The power to retain a voluntary patient for medical reasons against his wishes has also been conceded in Principle 15 (3) of the UN Principles. Article 7

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62 CEDAW Convention, Article 12 (1): States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health services, including those related to family planning.

63 CRC, Article 24 (1): States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

64 The General Assembly by its resolution 46/119 of 17 December 1991, adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. The 25 Principles define the fundamental freedoms and basic rights of persons with a mental illness, or who are being treated as such, and deal with such matters as the right to life in the community, how mental illness is determined, consent to treatment, admission to treatment facilities, medication and treatment, rights and conditions in mental health facilities and procedural safeguards (United Nations in the field of Human Rights 1994).

65 Criticising this view author says that institutionalised care when provided without consent of the person confined, is a deprivation of life and personal liberty. (Dhanda 2000: 69).
of the ICCPR also speaks on free consent to medical or scientific experimentation.\textsuperscript{66}

The Committee on Economic Social and Cultural Rights (CESCR) in General Comment No.5 on persons with disabilities quotes the Standard Rules in indicating that the same level of medical care within the same medical system for persons with disabilities and persons without disabilities is a key element of the right to health. The CESCR interprets Article 12 of the ICESCR as a guarantee ‘to have access to, and to benefit from, those medical and social services...which enable persons with disabilities to become independent, prevent further disabilities and support social integration’.\textsuperscript{67} The CESCR’s approach to the right to health is based on the fundamental principles of human rights, that is, self-determination as informed consent, autonomy and dignity, freedom to receive treatment in appropriate manner, and the principle of participation for achieving greater independence. CESCR General Comment No.14 on the right to the highest attainable standard of health provides the most detailed interpretation to date of State obligation and internationally accepted standards and principles arising from the right to health. There, the CESCR stresses ‘the need to ensure that not only the public health sector but also the private providers of health services and facilities comply with the principles of non-discrimination in relation to persons with disabilities’. Physical or mental disability is specifically mentioned as a prohibited ground of discrimination.\textsuperscript{68}

Regional human rights instruments in the Inter-American system,\textsuperscript{69} the African system,\textsuperscript{70} and the European system\textsuperscript{71} have also affirmatively recognized the human right to health and rehabilitation. In addition, WHO recognizes the international human right to health in its Constitution by stating that ‘[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social

\textsuperscript{66} Article 7 speaks: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

\textsuperscript{67} See CESCR General Comment No. 5, para 34.

\textsuperscript{68} See CESCR General Comment No. 14, para 14.

\textsuperscript{69} American Declaration of the Rights and Duties of Man (1948) Article 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights-'Protocol of San Salvador' (1988), Article 10 (and Article 11, the right to a healthy environment)


\textsuperscript{71} European Social Charter (1961) and the Revised Charter (1996), Article 11.
The Draft Convention on Disability in Article 21 (A/AC.265/2004/WG.1) identified key human rights issues related to health and rehabilitation of persons with disabilities. The relevant draft article addressed the issues of

(i) Free and informed consent
(ii) Prevention of unwanted medical and related intervention and corrective surgeries from being imposed on persons with disabilities
(iii) Protection of the privacy of health and rehabilitation information, and
(iv) Participation in legislative and policy development as well as in the planning, delivery and evaluation of health and rehabilitation services.

4.5.2 Domestic standards

Under the Constitution of India, Articles 39(e), 41 and 42 of the Directive Principles of State Policy deal with 'the right to health', which are theoretically non-justiciable. Along with these provisions, by interpreting Article 21 of the Constitution, the Supreme Court in several judgments analyzed the right to health. For instance in Bandhua Mukti Morcha v. Union of India\(^73\), the Supreme Court held that,

Right to live with human dignity enshrined in article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of article 39 and articles 41 and 42 and at least, therefore, it must include protection of health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and conditions of freedom and dignity……..

Similarly in Consumer Education & Research Centre and Others v. Union of India and Others\(^74\), the Supreme Court held the expression 'life' in Article 21 as having a wider meaning which includes the right to livelihood, better standard of life, hygienic conditions at work place and leisure.

\(^{72}\) See Constitution of the WHO, Preamble.
\(^{73}\) AIR 1984 SC 802.
In another case,\textsuperscript{75} a wider meaning was given to the concept of health. It was held that:

Health is a state of complete physical, mental and social well being and not merely the absence of disease or infirmity.

The Persons with Disabilities Act, which deals with all aspects of the disabled community, reflects only a narrow understanding of the right to health with emphasis on prevention, cure, improvement or elimination of disability, which are only the conditions that exist before the onset of disability. Article 25 of the Act states:

Within the limits of their economic capacity and development, the appropriate Governments and the local authorities, with a view to preventing the occurrence of disabilities, shall,

(a) undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities;
(b) promote various methods of preventing disabilities;
(c) screen all the children at least once in a year for the purpose of identifying 'at-risk' cases;
(d) provide facilities for training to the staff at the primary health centres;
(e) sponsor or cause to be sponsored awareness campaigns and disseminate or cause to be disseminated information for general hygiene, health and sanitation.
(f) take measures for pre-natal, peri-natal, and post-natal care of mother and child.
(g) educate the public through the pre-schools, schools, primary health centres, village level workers and anganwadi workers;
(h) create awareness amongst the masses through television, radio and other mass media on the causes of disabilities and the preventive measures to be adopted.

In the context of the 'Right to health of workers', Article 38(1) (d) of the PWD Act provides:

\textsuperscript{75} C.E.S.C Ltd. v. Subhash Chandra Bose; (1992)1 SCC 441.
The appropriate Governments and local authorities shall by notification formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for... (d) health and safety measures and creation of non-handicapping environment in places where persons with disabilities are employed.

Furthermore, Article 67 of the PWD Act guarantees on Insurance scheme for employees with disabilities.

Mentioning specific legislation, the first Central legislation enacted by the Government of India is the Rehabilitation Council of India Act, 1992. The National Trust for the Welfare of the Handicapped and the Mental Health Act are yet other legislation. In addition, the Government of India has set up seven national institutes for various categories of disabilities, namely physically handicapped, visually handicapped, hearing handicapped and mentally handicapped in different parts of the country. Regional Rehabilitation Training Centres and District Rehabilitation Centres were also started by the government of India. On the whole, there has been a steady growth in the services for the disabled in India. But the rehabilitation services for the handicapped do not find any place in the primary healthcare system of the country till date. People with disabilities have come a long way, from where there were no organized efforts to ameliorate their sufferings but still they are in a mid way as far as rehabilitation services are concerned.

4.5.3 Problems in India

Article 25(e) of the Convention has mentioned about the provision of health insurance and life insurance, which have to be worked upon in India. As of now, various schemes of the LIC and other insurance companies are not applicable to mental patients and insurance companies charge very high premium from disabled

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There are 5 composite Rehabilitation Centres, 4 Regional Rehabilitation Centres, 120 District Rehabilitation Centres providing various kinds of rehabilitation services to persons with disabilities. There are also several national Institutions under the Ministry of Health and Family Welfare working in the field of disability.
persons. 

Again, the term ‘disabled’ is mentioned only under Entry 9 in List II in the Seventh Schedule of the Constitution of India, which reads: “Relief of the Disabled and Unemployed”, which means that it comes under the responsibility of State governments pursuant to the division of responsibility between the State and the Union.

However, rehabilitation does not find any place in either the State or Union List. Not mentioning separately on ‘Rehabilitation’ and clubbing with ‘Unemployed’ indicates that disabled were considered generally unemployed and worthy of receiving relief. 

With regard to disabled, there are several other general entries under the Constitution, namely,

i. Entry 23 of List III which reads, “Social Security and Social Insurance; Employment and Unemployment”;

ii. Entry 25 of List III which reads, “Education, including Technical Education….Vocational and technical training of labour”;

iii. Entry 16 of List III which reads, “Lunacy and Mental Deficiency, including places for reception or treatment of lunatics and mental deficients”;


It shows that they are for everyone-disabled as well as non-disabled, which is the cumulative responsibility of Centre and the State. The intention of the framers of the Constitution is not vivid here.

Article 41 of the Constitution, specifies the right to public assistance in case of disablement, which is subject to the economic capacity of the State. The disabled, who were held as unemployables initially, have now been provided with job reservations in State sector and all round promotion of rehabilitation through government, etc., which shows a remarkable shift in the approach from the time Constitution was drafted. These significant changes have to be reflected in the Constitution through suitable amendments.

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It is an accepted fact that the disabled require not only relief but also welfare and rehabilitation. Therefore, the entry, relief of the disabled and unemployed may be taken out of the List II (State List) and the Entry Welfare, Rehabilitation and Relief of the Disabled and Unemployed be inserted in List III (Concurrent List).\textsuperscript{80}

The International Convention has specific provisions on "Health and Rehabilitation", which is as such lacking in Indian legislation. So it is high time to make changes in the specific area.

Again, only a small proportion of the disabled have benefited from the most innovative technological developments, public education and awareness campaigns.

4.5.4 Suggestions for change

- Legislative changes

(i) The section on prevention of disabilities is to be removed if it is in conflict with the Convention.

(ii) Appropriate government to provide for affordable and accessible health care service to persons with disabilities.

(iii) No hospital or health care centre to discriminate against a person with disability by refusing to treat a person on the ground of his/her disability.

(iv) Insurance companies, including those in private sector not to discriminate against persons with disabilities for the purpose of providing insurance. Insurance companies are not to charge higher premium rates for persons with disabilities.

(v) Provisions to ensure that health interventions of persons with disabilities including persons living with mental illness are to be made in accordance to the norms of confidentiality and informed consent.

\textsuperscript{80} Central Government will be more competent in dealing with the disabled as they are already having the competence to legislate for the employment, education, social security and social planning of the disabled.
(vi) Provisions to ensure that there is total prohibition of unmodified ECT invasive surgical procedures and forced sterilisation.

- Rules, regulations and guidelines

(i) Provisions for rehabilitation centres and hospitals to document, at all stages, treatment protocol and therapy administered to a person with disability which is to be regularly updated and shared with the patient. Such transparency of information in medication/therapy given to the patient is of assistance to doctors that the person may consult in the future for treatment or rehabilitation.

(ii) Provisions and protocol to safeguard the health and the interest of the person with disability in the event of a communication gap between the medical practitioner and the person with special needs who is unable to communicate his/her conditions accurately to the doctor.

- Schemes and programmes

(i) Appropriate government to make provisions for early detection and intervention to identify persons with disabilities.

(ii) Appropriate government to provide for health insurance for persons with disabilities with the provision of low rates of premium.

(iii) Exemption of payment of premium for those persons with disabilities whose family income is below a certain level as determined by the government.

(iv) Priority for persons with disabilities in emergency services like accessing ambulances and special attention to the health care facilities of women with disabilities.

(v) Special centres at all hospitals and medical colleges for training of doctors, researchers, care-givers, support staff with special focus on the special needs of persons with disabilities and suitable modifications in the medical curriculum to incorporate a component on disability issues.
(vi) Appropriate provisions for respite care for the family members and care givers of persons with disability.

4.6. Right to life

Persons with disabilities face unmatched vulnerability in securing the right to life. Too often they are denied access to basic needs for survival and appropriate medical care. In situations of conflict they are too often overlooked. Mortality for children with disabilities may be high as 80 per cent in countries where under-five mortality as a whole has decreased to below 20 per cent. Recent attention on the practice of euthanasia and assisted suicide has raised concerns about the private domain in which these practices are being carried out and the cultural context within which they are happening. The lack of critical and cultural reflection on these issues has increased the vulnerability of persons with disabilities, for example, through the withdrawal of food and fluids or other life sustaining treatments as well as the use of “do not resuscitate” orders (CACl 2005:2)

4.6.1 International standards

The right to life is not an absolute right to life, but rather a right not to be arbitrarily deprived of life. It appears in all the general universal and regional human rights instruments, including Article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR.\(^81\) The Human Rights Committee has commented in its General Comment No.6 that the right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.\(^82\) However, the Committee has noted that quite often the information given concerning Article 6 was limited to only one or other aspects of this right. It is a right which should not be interpreted narrowly.

- Abortion, right to life and disability

One of the most contentious issues in relation to the right to life under international law has been the question of whether a foetus should be recognised as

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\(^81\) Its first clause provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

\(^82\) Article 4.
the bearer of the right not to be arbitrarily deprived of life, and to what extent the State may regulate access to abortion. International courts and tribunals have not addressed the difficult philosophical issue of when life begins, but have focused on the meaning of the language used in the relevant treaties. They have generally held that the references to ‘every human being’ or ‘every person’ do not include an unborn foetus.83

The disability issue is of some importance in relation to the debate over the lawfulness and permissibility of allowing a woman to decide to abort a foetus if there is evidence that the child will be born with a disability. One question which poses is ‘Could a State lawfully prevent a woman from taking tests to identify whether a foetus shows signs of any disability, or prohibit abortions solely on the basis of a diagnosis of disability?84 (NHRC 2005:166) At this stage there does not appear to be a consensus that a State could lawfully ban a woman from deciding to abort a foetus with a disability or which was likely to develop a disability. The right of the mother and father in this case is likely to prevail over a State interest in protecting the foetus, or a broader State interest in preserving diversity of human beings by ensuring the preservation of different forms of disabilities. On the other hand, these is a clear understanding that the State cannot compel a woman to abort a foetus because it has a disability or is likely to develop one after birth. Similarly, it is accepted that the power of the State to ban the use of sex selection tests and abortions of female foetus is consistent with international law, even though it does not interfere with a woman’s exercise of choice in relation to abortion that she may enjoy on the other grounds.

- Right to die

International human rights treaties do not contain any express right for a person to choose the time and manner of his or her death (either by suicide or assisted suicide), nor do they prevent a State from providing manner of his or her death (either by suicide or assisted suicide), nor do they prevent a State from providing for such

83 The one exception in this regard is the American Convention on Human Rights, whose Article 4 (1) explicitly provides that the right to life is to be protected by law ‘from the moment of conception’
84 Some disability groups have argued that allowing such abortions tantamount to a form of genocide, because it is intended to eliminate a particular subgroup of human beings (as much as certain eugenic policies like the sterilization of persons with intellectual disabilities in a number of countries, or the murder of persons with disabilities in Nazi Germany)
actions to be lawful. In some cases the right not to be subject to inhuman or degrading
treatment or punishment may be relied on to reject the provision of artificial or
unreasonable measures to keep a person alive against the person’s will. The European
Court of Human Rights in a case involving a woman with motor neurone disease
who wished to end her life but needed the assistance of others to do so, held that the
guarantee of the right to life did not include the right to choose when to end one’s life
and to do so assisted by others.

4.6.2 Domestic standards

Article 21 of the Constitution of India provides that ‘no person shall be
deprived of his life and personal liberty except according to the procedure established
by law.’ Although developments have occurred in constitutional law it has to be
noted that the application of these pronouncements on persons with disability has not
been tested out by any class actions or litigations in public interest. The jurisprudence
of the Indian Supreme Court has started to fore-ground the inextricable connection
between civil-political and social-economic rights. These developments also show
how the text of a civil-political right has been imaginatively used by the court to
render socio-economic rights justiciable.

A disability linked development came to the fore in the case of A. B Gupta v.
Union of India where the Supreme Court was required to decide upon the relevance
of the state of mind of an accused who had been sentenced to death. The accused was
convicted of multiple murders and had exhausted all appeals against conviction. In the
petition before the Supreme Court it was contended that the execution proceedings
should be stayed since the accused was not of sound mind.

The court dismissed the petition as a desperate argument and refused to grant
relief to the petitioner. However, the Court did not confine itself to the facts of the
case and went on to rule that there was nothing in Indian law which prohibited the

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86 The extent of the protection provided by the article came to be disputed soon after the adoption of the
Coralie Mullin v. Delhi Administration (AIR 1981 SC 746) Olga Tellis v. Bombay Municipal
Corporation (AIR 1986 SC 180) P. Rathinam v. Union of India (AIR 1994 SC 1844). In consonance
with this approach the Court has given new dimensions to the term ‘right to life’.
87 AIR 1977 SC 608.
execution of an ‘insane convict’. It shows how disability is often employed by non disabled people as a forensic technique to wriggle out of difficult situations. Thus questions on the continuance of such practices and the need for measures to prevent their misuse continue to come on the fore.

There are two other issues concerning persons with disability which need to be flagged out within the right to life discourse. One relates to the survival of persons with disability in natural or man-made disaster situations- an issue which as yet is still within the realm of executive policy. The other question arises around provisions such as section 4(3) (iv) of the Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Selection) Act 1994 which allows for prenatal diagnostic techniques to be employed if ‘the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease’. There are no easy answers to such complex issues that entangle the right to life of the disabled with the reproductive rights of women.

4.6.3 Major issues

Some unresolved issues connected with reproductive rights of women are highlighted in the first section and concluded with the complexities connected with the concept of euthanasia.

- Do people with disability even have sex lives?
- Do they have the right to reproduce and raise their own babies?
- Whether a mother has a right to abortion vis a vis the right to life of the unborn who is detected disabled?
- Whether the statutory time limit for abortion must be increased from the currently permitted twenty weeks of gestation to twenty four weeks or above?

Of the issues confronting people with disability, sexuality is the most charged. A recent case88 brought many of the most compelling strands of this complex tapestry

88 In Suchita Srivastava and Another v. Chandigarh Administration., 2009(11)SC 409, a young woman with a mental handicap, living in a government institution as a State ward, had been raped repeatedly by two guards there. At 19, she became pregnant. When her condition was detected, the State determined she should have an abortion. The woman insisted she wanted to keep the child. The
together and it took the Supreme Court to settle it (The Hindu: 2009)

Supreme Court took the view:

“No woman, even one with a mental handicap, can be compelled to have an abortion.” Her pregnancy was ordered to be terminated by the High Court in spite of her insistence that she wanted the baby. Here is the heart of the issue.

- Can a person with an intellectual disability make a decision?
- Is intellectual capacity required for parenthood?
- What about the baby’s right to life? 89
- Is the State justified in forcing someone to undergo an invasive procedure?

Disability related abortion is actually built into the Indian law 90 which permits abortion up to 20 weeks if there is a pre-natal diagnosis of congenital defects; a pre-natal diagnostic test would be meaningless without the possibility of correcting the problem in uterus or terminating the pregnancy. In the famous Nikita Mehta’s case 91, the foetal heart defect could only have been detected after 20 weeks’ gestation. The decision to give birth to a child who is disabled can never be easy, even in the best of circumstances. The actual problem arises when the reason for abortion is not the risk posed by the pregnancy but the perceived consequences of giving birth to that child. These risks are not physical but social. It would be incorrect to posit this as a conflict

89 Abortion of babies with disability is routine, sanctioned and worse, expected. In U.S.A, it is estimated that 95 per cent of babies detected with Down Syndrome are aborted. Women who elect to have their babies anyway are made to feel irresponsible, reckless and unfairly burdening society
91 Dr. Nikhil D. Dattar v Union of India 2008, vol 110 (9) Bom. L.R 3293, Popularly known as the Mumbai Abortion Case. In this case, Niketa and her husband, along with the specialist who diagnosed a congenital anomaly in the foetus, filed a petition in the Mumbai High Court asking for permission for an abortion in the 23rd week, which was when the problem was detected. The argument supporting them is that in several countries, including the United Kingdom, there is no gestational age limit set for abortion in the case of foetal abnormalities. Niketa’s personal reason for wanting an abortion was that she did not want to give birth to a severely disabled infant and witness its suffering; the trauma caused to her and her family was an additional reason. While Niketa failed to obtain a favourable judgment from the court, her case has prompted the government to announce that it will be considering a review of the law. Further, this case raised several ethical dilemmas related to abortion, and also to disability and the role of medical intervention.
between woman and foetus. One would have to explore the woman’s reasons for wanting an abortion. In this case, Niketa was as concerned about the possible suffering of the future child as her own suffering. The question remains: does one’s endorsement of the right to abortion on grounds of disability at any point in the pregnancy weaken one’s commitment to the rights of the disabled? (Madhiwalla: 2008).

Eminent philosophers\(^92\) speak openly of the moral right of parents to abort handicapped babies before they are born and afterwards too. At the moment, it is acceptable only in early infancy, before parents get ‘attached’. But as ethicists admit, if it’s acceptable to abort a disabled baby before birth, what’s wrong with doing it later?

Thus the current discourse on the right to life has brought the following to the fore:

(i) The indivisibility of rights and the inextricable connection between civil-political and social-economic rights;

(ii) The need to interrogate forensic techniques which seem to be taking advantage of stereotypical perception of disability;

(iii) The necessity of addressing the issue of survival of persons with disability in disaster situations; and

(iv) Questions about the selection of foetus and the use of technology.

The implication of the term euthanasia\(^93\) is itself cloaked in ambiguity. Euthanasia is defined as an intentional killing by an act/omission of person whose life is not to be worth living. The definition of euthanasia is simple but the concept of euthanasia proposed by adherents of the euthanasia movement is complex and has

\(^{92}\) Dr. Peter Singer of Princeton is one example

\(^{93}\) The term is derived from the Greek word euthanasios meaning good death. In its earlier form, it was used as an omnibus term to signify a painless death. In its modern context, the term is used as a deliberate euphemism to reduce the guilt of an act which is a division of murder by injecting the term mercy.
profound consequences for all (Agrawal: 2006). Euthanasia may be classified as active or passive or alternatively as voluntary, non-voluntary and involuntary. Active euthanasia involves painlessly putting individuals to death for merciful reasons, as when a doctor administers a lethal dose of medication to a patient. Passive euthanasia involves not doing something to prevent death, as when doctors refrain from using devices necessary to keep alive a terminally ill patient or a patient in a persistent vegetative state. In voluntary euthanasia, a person asks for death (by either active or passive euthanasia). Non-voluntary euthanasia refers to ending the life of a person who is not mentally competent, such as a comatose patient, to make an informed request for death. Apart from these there is involuntary euthanasia where a person is killed against his express will.

In India there is no specific law concerning euthanasia, though it is much desirable. The need of the same arises when a person is terminally ill and not capable of cure. The sufferings of an ill person need not be prolonged by forcefully keeping him alive with all the pains and sufferings. That is definitely a violation of Article 21 of the Constitution of India which provides a right to dignified life.

The real issue today is three types of cases:

Firstly, people who want to die and commit suicide. Suicide is a private individual act of ending one’s own life. Even though the act of suicide is an offence against life, it is not punished merely because the person who commits suicide is no more. Even attempt to commit suicide is not punishable in many countries because, the person needs sympathy and compassionate treatment for recovery from depressing thoughts of suicide, rather than punishment for failure in attempt to end his or her life.94

Secondly, People who can communicate their desire to die, but need assistance in committing suicide due to helpless condition arising out of infirmity caused by physical or mental illness, disease, old age or such other condition; so that, even for committing suicide, they require help of others.

94 However, it must be noted that, if some other person has abetted or aided or instigated the suicide that person remains criminally liable.
And thirdly, people who are unable to communicate their willingness or consent to death because of physical or mental disability, terminal illness or paralysis or coma or otherwise and need euthanasia. And here exactly the ethical and legal debate for right to die begins (Pawar: 2010).

4.6.4 Judicial response in India


Case:
The Andhra Pradesh High Court was confronted with a very pathetic case of a terminally ill boy of 25 years seeking court's permission to a peaceful end, so that he could donate his organs to some one needy before he is finally pronounced dead. K. Venkatesh, a budding chess player whose career was cut short by a crippling attack of muscular dystrophy was on life support system at the city's Global Hospital in Hyderabad. He was conscious and understood what he was being told. But, he could not speak. Muscular dystrophy leads to a slow decay of muscles and is incurable. The disease struck Venkatesh when he was only 10 years old and he has been bound to wheelchair since.

Venkatesh's muscles from his legs to neck have stopped functioning and the life support system let him breathe. Doctors say that he won't survive once he is taken off the ventilator. The doctors at the hospital have refused to entertain Venkatesh's appeal for 'mercy killing' for it is illegal to take a patient who is alive of life support. Doctors say,

"The hospital cannot do a thing as long as the law of the land does not approve of mercy killing."

Doctors at the hospital reported that Venkatesh developed serious chest infection besides dystrophy. His days were numbered but he wanted to die before his

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96 See also (Sharma 197-214: 2004)
organs are infected. After his death, organs will be in no shape for harvesting and cannot be used for any person.

Decision:

The petition was rejected by a two-judge bench of the Andhra High Court. The Honorable High Court turned down the humanitarian appeal of an ailing man on deathbed who wanted to donate his organs to someone needy before he could die. With due respect, it is submitted that the Honorable Court could have taken a pragmatic view and applied the law keeping in view the objective and purpose for which the request was made which was obviously to save a human life instead of applying the dead letter of law literally. No doubt, 'right to life' is an absolute right and non-negotiable, but in the particular case the request was made to save the 'right of life' of someone who is on deathbed by giving a chance to get his defunct organs replaced from Venkatesh's organs, whose days were numbered as already medically pronounced by the doctors. In such a case Venkatesh was having the most pious objective of igniting the candle in the life of someone unknown by granting a lease of life. 97

Perhaps it would have been better in the fitness of things that the Court before taking a final decision should have carefully examined the pros and cons of the entire issues after thoroughly studying the decided cases on the subject in different parts of the world and arrived at a reasonable decision considering humanitarian appeal of a poor boy to fulfill his 'last wish' without arbitrarily rejecting the request. 98

According to a recent decision of the Supreme Court, ‘active euthanasia’ is still illegal while ‘passive euthanasia’ may be permissible in exceptional circumstances. The court recently dismissed the plea for mercy killing brought by a writer, Pinky Virani on behalf of a 60 year old nurse, living in a vegetable state for the past 37 years in a Mumbai hospital after a brutal sexual assault 99 (The Hindu : 2011).

97 See also Dr. Nikhil D Datar v. Union of India, 2008 Vol 110 (9) Bom L.R 3293.
98 See also critical reflections on euthanasia and people with disability by Christopher Newell, The Australian Quarterly 1996 Vol. 68 No.3.
99 Aruna Ramachandra Shanbaug v. Union of India and others, In the Supreme Court of India, Writ Petition (criminal) No. 115 of 2009, a nurse of KEM Hospital in Mumbai, was raped by a ward boy in 1973. It was a case of 'unnatural sexual offence'. The attempted asphyxiation had cut off oxygen supply to her brain resulting in a brain stem contusion injury and cervical cord injury apart from leaving her cortically blind. She went into a coma after that incident and was pronounced brain dead. The interesting part is that the her attacker was punished not for rape or sexual molestation,
The Supreme Court seems not to reject the idea of passive euthanasia. It is the lack of the law which made the honourable judges to give the verdict against Aruna’s petition for mercy killing. We hope the Indian Parliament will pass a bill for passive euthanasia so that Aruna may forever have the peace and freedom she deserves.

To conclude it is high time to find answer to the question, "Does Article 21 of the Constitution guarantee a 'right to life' or a 'liability of life'?" Now if it is 'right to life', let's ask another question - "Is a right to be enjoyed or to be forced upon? i.e., can a person be forced to 'enjoy' a right to his detriment?"

4.7 Equal recognition as a person before the law and full legal capacity

Acceptance as a person before the law ensures the applicability of guarantees of equality and non-discrimination and is a pre-requisite for individuals to be fully recognized as subjects of rights. However, this generally accepted norm has become a day dream for persons with disabilities. They are often relegated by the society itself based on the ground of 'lack of legal capacity'. Difficulties often faced by them are discussed in this section.

4.7.1 International standards

Article 16 of the ICCPR provides: ‘Everyone shall have the right to recognition everywhere as a person before the law’

Article 14 of the ICCPR (and Article 6 of the European Convention) contains a general guarantee of rights to a fair hearing in the determination of criminal charges against a person, as well as listing a number of specific rights which form part of the overall right. These are obviously of importance to everyone, including persons with disabilities, but there may be particular circumstances for some persons with disabilities which require specific steps to be taken to ensure their enjoyment. The sort of issues which arise for persons with disabilities in relation to this guarantee

\[^{100}\text{E.g. right to an interpreter, right to legal assistance in certain circumstances, right not to incriminate oneself etc.}\]

\[^{101}\text{E.g. by providing sign language interpretation in court so that a person with a hearing impairment can follow and participate in proceedings.}\]
include assumptions that persons with disabilities lack legal capacity and are not physically or intellectually capable of managing their own affairs; and denial of rights to participate in such capacities as jurors or other public offices. The 2004 Ad Hoc Working Group on the Convention on the Rights of Persons with Disabilities identified a number of these in its draft Article 9, which set out a clear presumption of legal capacity of all persons with disabilities and required that a person was entitled to such assistance as is necessary to exercise that capacity.102

4.7.2 Domestic standards

The law operates on the presumption that all persons are of sound mind and possess legal capacity but the legal personhood of those with unsound mind seems to cease. Once a person is psychiatrically diagnosed as ill, he is believed to have crossed the threshold of normalcy. Though there are examples of judicial pronouncements where a ‘psychiatrically ill person’ may not be judicially characterised as a ‘person of unsound mind’, in the main, a psychiatric diagnosis makes a person liable to be found incompetent. This finding of incompetence has far reaching implications because the law perceives it as a ground for divorce, a disqualification for retaining custody of child or taking a child in adoption, and incapacity to enter into any contact.

Further, where a person with mental illness after an investigation by a competent court is found unable to manage his or her affairs, a guardian to his person and a manager for his property are appointed to undertake these tasks. The National Trust Act, 1999 however, makes a slight departure from the Mental Health Act since it requires the decision of guardianship to be taken out by a court, but by a Local Level Committee comprising District Magistrate, a parent and a person with disability. Moreover, Section 14(3) (a) of this Act requires that a guardian is to be appointed only if required and only for those matters in which the person with a disability needs assistance.

This issue of legal capacity is not only limited to the management of personal

affairs but also features in several other formal arrangements.\footnote{For example, a contract may be nullified due to the absence of contractual capacity in one of the parties; or a guardian ad litem may be appointed for a party if such party is considered to be mentally infirm' or of 'unsound mind'.}

Surprisingly, guardians have also been appointed not just for person with a psychiatric diagnosis, but also for persons found to be 'deaf and dumb'. The disability of hearing and speech impairment also assumes importance in criminal proceedings, which provide the procedure to be adopted when the accused are ‘persons who thought not of unsound mind cannot be made to understand a criminal proceeding’. Despite the lack of the understanding of the accused, the court is required to proceed with the inquiry or trial. However, if such proceeding results in a conviction, then the matter of lack of understanding of the accused is to be reported to the High Court to enable it to determine whether the accused has had a fair trial and whether a conviction should be sustained.

The existence of disability does not always amount to lack of understanding although in a number of cases the Court has drawn this inference.\footnote{Rex v. Goonga [AIR 1950 All 143]; King v. Arakhit [AIR 1953 Ori 30]; State v Genda [AIR 1954 MB 35]; in re Padmanabhan Nair [AIR 1957 Ker 9]; in re Sankaralingam [AIR 1957 Mad 24]; in re Peethambaran [AIR 1959 Ker 165]; State v. Radhamal Sangatmal Sindhi [AIR 1960 Born 526]; State of Kerala v Challian Kottan [(1960) 2 Ker L R 206]; State v. Mookama [AIR 1964 Mys 182]; The State v. Kampu Shetty [AIR 1965 Mys 95]; In re Oomai [AIR 1955 NUC (Mad) 2448] the court found it unsafe to convict a deaf and dumb person on the basis of gestures alone. The court further ruled that it could not then be presumed that a ‘deaf and dumb’ cannot be tried and convicted. Even as in AIR 1953 Oris 30 the court ruled that if the accused is deaf and dumb there is presumption as to absence of mind.} In fact the court is required to find out how do the families of the person with disability communicate with him or her to endeavour to see whether the accused can be made to understand the proceedings.\footnote{AIR 1957 Ker 7} In order to aid understanding courts should make available appropriate interpretation facilities.\footnote{For example in re Sankaralingam [AIR 1957 Mad 24] the accused was made to understand proceedings with the help of a teacher in the deaf and dumb school.}

In the face of these findings one can say that the legal construction of incapacity is discriminatory. This is the contention that was mounted by the World Network on Users and Survivors of Psychiatry. Article 12 of the Convention on the Rights of Persons with Disabilities has addressed this concern by declaring that all persons with disabilities are possessed of full legal capacity. And for persons who find it difficult to take decisions it would be more enhancing of respect and dignity to
accord recognition to supported decision – making and advance legal directives.

In these circumstances it may be worthwhile to consider:

(i) The constructed nature of legal capacity and how different groups at different points of time have been found to possess or not possess legal capacity. 107

(ii) The difference between ability to take a decision and wisdom of a decision. 108

(iii) Dignity of risk (considering that a certain level of peril subsists in all human activities) an integral component of human dignity. 109

(iv) The inherent worth to err and learning from failures and mistakes

(v) The difference between supported and substituted decision making

(vi) Would the plea of incompetence by any means can safeguard and protect a person with disability.

For effective implementation States Parties shall ensure that involuntary treatment of persons with disabilities is:

107 According to Dr. Amita Dandha, the term legal capacity is a social construct; hence biased by the medical approach to its definition. The underlying assumption by her is that the legal capacity of mentally ill persons is on par with all disabled persons and therefore their consent is essential for treatment. As a rider she adds that, “Forced treatment” and “Forced rehabilitation” must be abolished. At the same time she is of the opinion that provision must be there in law for it if necessity arises to protect the right to treatment.

108 States Parties shall ensure that all legislative or other measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible, and are subject to periodic impartial and independent judicial review. The safeguards shall be proportional to the degree to which such measures affect the persons’ rights and interests and needs? If the person needs it lifelong, yes.

109 States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property. (What is to be done if they are not in a position to manage their financial decisions? Should we not mention guardians here also?)
(a) Minimised through the active promotion of alternatives; (What are these alternatives?)

(b) Undertaken only in exceptional circumstances, in accordance with procedures established by law and with the application of appropriate legal safeguards; in most cases in India, the informal practice of involuntary treatment arising out of the relationship between the client families, the patient and the treating Psychiatrist is more humane than what law can enforce. Just like conventions and customs in society that cannot be moulded into any legal framework, there are certain cultural and societal practices of Psychiatry that must not be disturbed by Law unless they are really cruel. The Mental Health Act 1987 needs amendment to prevent abuse but it is not a piece of redundant legislation.

4.7.3 Suggestions for change

- Policy initiative

There is a need to move from a paternalistic disqualifying mode of dealing with persons with disabilities to a rights based model of universal legal capacity with support. This initiative would require allocation of requisite resources for the creation of support.

- Legislation

(i) It was accepted in all consultations that legal capacity of person with disabilities should be recognised and disqualifying regimes which denied such legal capacity should be dismantled and support networks which support the exercise of such capacity should be repealed.

(ii) There was some unease on whether in repealing disqualifying regimes the institution of guardianship should be abolished. A number of participants felt that may be required in the rarest of rare cases and after strict scrutiny but where required guardianship should be permitted.
(iii) The new law should incorporate a provision which recognizes the rights of persons with disabilities to access the judicial system and requires that procedural and age appropriate accommodations may be made to facilitate the direct and indirect participation of persons with disabilities in all legal proceedings.

- Schemes and programmes

(i) States to promote appropriate training for those working in the field of administration of justice including police and prison staff in order to ensure effective access to justice for persons with disabilities.

(ii) Programs establishing support services to be promoted.

(iii) State to create a panel of sign language interpreters which will have trained interpreters who can be called upon by Courts, police stations, hospitals etc and for all points of public dealing with hearing and speech impaired persons.

4.8 Summing up

The Indian disability sector is in the midst of revolutionary reforms. The disability sector has been demanding a new disability law based on the UN Convention on the Rights of Persons with Disabilities which took the shape of Working Draft of the Rights of Persons with Disabilities, 2010. The Ministry of Social Justice and Empowerment, through an Office Memorandum,\(^{110}\) constituted a Committee to “draft a new legislation to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995” (“Committee”). The main aim of setting up the Committee was to ensure that the PWD Act was in consonance with the United Nations Convention on the Rights of Persons with Disabilities and not to amend any of the other disability legislations. After the Committee was set up, the minutes of the meeting of the Committee dated 22-07-

2010\textsuperscript{111} showed that the Chairperson reminded the Committee members of the specific purpose for which it was set up and was therefore “not going to debate on formulating one comprehensive law that would repeal all other current disability legislations such as The National Trust Act, Mental Health Act and Rehabilitation Council of India Act, etc”. Subsequently, the Consultant appointed by the Committee released several drafts and the latest Working Draft of the Rights of Persons with Disabilities Act, 2010 is dated 01.12.2010 (“Working Draft”).\textsuperscript{112} The Working Draft surprisingly states that “the mandate of the Committee to the Consultant was to put together a comprehensive legislation which covers all rights of all persons with disabilities.” Further, the Statement of Objects and Reasons of the Working Draft proposes to “replace the current disability legislations with a comprehensive law which recognises all rights of all persons with disabilities”.\textsuperscript{113} These statements in the Working Draft raise some confusion as to whether the mandate given by the Committee has been clearly understood before the drafting process commenced. If the mandate was indeed to only amend the PWD Act and not to amend any of the other legislations such as the National Trusts Act, the Mental Health Act and the Rehabilitation Council of India Act, then the drafting should have been restricted to amending the PWD Act to the extent possible, and not to affect the provisions of the other legislations.

Some of the provisions of the working draft which are overlapping and contradictory to the three other disability legislations also need to be looked seriously.

(i) There is contradiction with regard to Section 2 (n) of the working draft with respect to the definition of ‘person with disability’\textsuperscript{114} and Sections 2(j) and (h)

\textsuperscript{111} See Minutes of meeting, 2\textsuperscript{nd} meeting of the committee to draft new legislation for persons with disabilities, (22nd July 2010).


\textsuperscript{113} From the Working Draft it is seen that there are several provisions which are contradictory to some of the provisions in these three legislations in significant ways. There is also concern as to whether the working draft has exceeded its mandate given by the Committee to only amend the PWD Act by attempting to draft a comprehensive disability law which includes even other disability legislations.

\textsuperscript{114} a person with any physical, mental, intellectual, developmental or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others
of the National Trust Act. While the Working Draft seeks to define disability on a social model, as per the Convention, the National Trust Act defines a person with disability in the context of medical conditions and only covering conditions such as autism, cerebral palsy, mental retardation or a combination of these conditions. The broad definition to a person with disability given in the Working Draft needs to be incorporated into the National Trusts Act, by suggesting an amendment to Section 2 (j), in Schedule 1 of the Working Draft so as to ensure that all persons coming within the definition of 'disability' are covered by the benefits of the National Trusts Act. If this is not done, then persons with many kinds of intellectual and other disabilities would be left out of the purview of the National Trusts Act. Since the two definitions follow two different schools of thought, it results in vagueness and inconsistency.

(ii) Section 7 A, Right to legal capacity and equal recognition before law of the working draft and Section 14 of the National Trust Act. The National Trust

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115 Section 2(j) defines a person with disability as: a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disabilities.

116 Section 2 (h) defines multiple disability as a combination of two or more disabilities as defined in the PWD Act, 1995;

116 Notwithstanding anything contained in any other law to the contrary, persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere as persons before the law.

(2) Any legislation, rule, notification, order, by-law, regulation, custom, practice that deprives any person with disability of their legal capacity shall be in contravention with this Act and hereinafter be void.

Section 7B(1): The Disability Rights Authority or any other Authority expressly established for such purpose shall take immediate steps to provide access to suitable support measures for the exercise of legal capacity by persons with disabilities, particularly the persons with disabilities living in institutions and persons who have higher support requirement.

(2) Plenary guardianship is abolished. Any legislation, rule, regulation and practice following or prescribing the system of plenary guardianship shall, hereinafter, be void.

Section 7C(1): The Designated Authority shall take immediate steps to put in place suitable support measures for the exercise of legal capacity by persons with disabilities and especially for persons with disabilities living in institutions and persons with disabilities who have high support needs.

Section 7D(1): The Designated Authority shall undertake the task of conceiving new kinds of support, and formulating guidelines on the already included support, in active consultation with persons with disabilities; disabled peoples organisations; parents associations and other concerned members of civil society.

(2) The Authority shall devise suitable mechanisms to obtain feedback from the recipients of support on the suitability and usefulness of the support provided and if and whether they desire any modification or addition to it.

117 (1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability.
Act does not recognise any right to legal capacity of persons with disabilities. It provides for the appointment of a guardian who will replace the person with disability in the decision making process. As a result of Section 7A (2), of the Working Draft, Sections 14 and 15 and all other relevant provisions of the National Trust Act which do not recognise the legal capacity of persons with disabilities and refer to appointment of a guardian would be rendered void. The reference in Section 7 (2) that any contravening provision of other legislations shall be void is not sufficient and would lead to all kinds of problems in the implementation of the National Trusts Act. Unless the relevant provisions of the National Trusts Act are also amended to bring in provisions of the right to legal capacity, this legislation would not be workable and it would basically render the local level committee without any powers. Further Section 7D of the Draft which provides for creation of support networks, substitutes the functions and objects of the National Trust under the Act. The National Trust is set up with the object of providing support networks to persons with disabilities. By Section 7D assigning the same function to an unspecified “Designated Authority”, the Draft encroaches in the area which is within the purview of the National Trust.

(iii)Section 10(6)\textsuperscript{118} and Sections 20 to 24 and Chapter IV of the Mental Health Act. Section 10(6) of the Working Draft which recognises a right of a person with disability to a non-coercive environment contradicts with the provisions under the Mental Health Act which provide for coercive and restrictive environment by allowing authorities to detain the person with disability and the appointed guardian performing many functions on behalf of the person with disability. Therefore, these provisions of the Mental Health Act need to

\textsuperscript{118}Persons with disabilities have a right to non-coercive, non-restrictive and supportive environment which fully respects their sense of space, safety and security.
be revised and amended before the Working Draft can recognise the rights under Section 10(6).

(iii)Section 13 A (11)\textsuperscript{119} and Section 21 of the Rehabilitation Council of India Act.\textsuperscript{120} Section 13A (11) of the Draft prescribes some of the conditions under which rehabilitation shall take place. This function is assigned to the Council under the Rehabilitation Council of India Act. Therefore the Draft displaces the power of the Council under the Act by prescribing the standards to be adopted by rehabilitation professionals who will be in charge of recovery and rehabilitation.

Since the Committee appointed by the ministry to draft the new legislation presented the final draft of the Rights of Persons with Disabilities Bill, 2011 to the minister, it is therefore, crucial that there is clarity on these important issues as to what exactly is being proposed to be amended. Whether it is only the PWD that is sought to be replaced or all other disability legislations are to be replaced by a Disability Code need to be understood by the drafters. If the mandate is only to amend the PWD Act, then it is important that we restrict ourselves to this mandate so as to ensure that other disability legislations are not affected. The other legislations can be amended at their own time, after the present PWD Act has been revised as per the mandate of the Committee. In addition to this, there is also an urgent need for policy initiatives in the above-mentioned areas and strengthening of the planning, implementation and monitoring mechanisms for the same.

\textsuperscript{119} The Central and State Governments along with the organisations working in the field of disability rights shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery, rehabilitation and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender and age specific needs.

\textsuperscript{120} The Council may prescribe standards of professional conduct and etiquette and a code of ethics for rehabilitation professionals. Regulations made by the Council under sub-section (1) may specify which violation thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any other law for the time being in force.